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The Supreme Court and Labor Dispute Arbitration: the Emerging Federal Law

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THE SUPREME COURT AND LABOR DISPUTE ARBITRATION: THE EMERGING FEDERAL LAW

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WITHIN the past few years, the United States Supreme Court has handed down a number of decisions of great significance to the labor dispute arbitration process. Some have been concerned with problems of arbitrability or arbitral authority; others with the availability and exclusivity of the arbitration process vis-à-vis alternative legal remedies for breach of the labor agreement; and still others with the effect of a breach of obligation by one party to the labor agreement upon the obligations of the other party. We propose in this article to analyze these decisions, to attempt to categorize the different kinds of challenges to arbitral jurisdiction or authority which can be made, and to assess, insofar as this may be done, the import of the Court's decisions for the arbitration process. In a sense, we shall be dealing with the extent to which, under developing federal law, judicial review of the arbitration process is available.

Our analysis will not take account, except incidentally, of lower federal and state court decisions rendered subsequent to the relevant Supreme Court decisions. This is not to suggest that the questions we shall be considering are so clearly answered (at least in all cases) by the Court's decisions that judicial intervention is no longer sought to any appreciable extent; indeed, the fact appears to be the contrary. Judges continue to be confronted with many of these questions, and their reactions vary. At another time we expect to attempt a more complete survey and appraisal of the lower court decisions. Here, however, we shall attempt to reach some independent judgments on the issues we shall be discussing, recognizing that our later, more complete examination may persuade us that some of the views here expressed should be modified.

I. THE 1960 TRILOGY

Any examination of the emerging federal law concerning the labor dispute arbitration process must begin with the famous 1960

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Trilogy cases.[1] These cases can be understood only in the light of the pertinent background.

A. *The Background Problems*

The problem facing the Court in these cases arose out of the fact that in this country the arbitrability of labor disputes usually requires the existence of an agreement to arbitrate. The only exceptions are so-called "minor disputes" in the case of railroads and airlines subject to the Railway Labor Act[2] and disputes in certain industries, principally local public utilities, which in some states are subject to statutory arbitration procedures.[3] With these exceptions, the arbitrator's authority derives basically from the agreement of the parties to the dispute, and his jurisdiction, as a matter of

1. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). For a previous discussion of these cases and of background matters which to some extent is repeated here, see Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties*, 16 SW. L.J. 1 (1962). See generally Aaron, *Arbitration in the Federal Courts—Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360 (1962); Cornfield, *Developing Standards for Determining Arbitrability of Labor Disputes by Federal Courts*, 14 LAB. L.J. 564 (1963); Davey, *The Supreme Court and Arbitration*, 36 NOTRE DAME LAW. 138 (1960); Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883 (1962); Hays, *The Supreme Court and Labor Law*, 60 COLUM. L. REV. 901 (1960); Meltzer, *The Supreme Court, Arbitrability, and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961); Smith & Jones, *Management and Labor Appraisals and Criticisms of the Arbitration Process*, 62 MICH. L. REV. 1115 (1964); *Symposium—Arbitration and the Courts*, 58 NW. U.L. REV. 466, 494-520, 532-44 (1963).

2. Under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1958), the National Railway Adjustment Board has been established with jurisdiction to hear and determine "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. § 153(i) (1958). Similarly, under Title II of the act, interstate air carriers and unions representing their employees are required to establish their own "boards of adjustment" for the purpose of hearing and determining these kinds of disputes. 45 U.S.C. § 184 (1958). It is settled law that these agencies have primary jurisdiction over "minor disputes." See International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963); Pennsylvania R.R. v. Day, 360 U.S. 548 (1959); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957); Sigfred v. Pan Am. World Airways, Inc., 230 F.2d 13 (5th Cir.), *cert. denied*, 351 U.S. 925 (1956). See generally Daugherty, *Arbitration by the National Railroad Adjustment Board*, in ARBITRATION TODAY 93 (1955).

3. See, *e.g.*, FLA. STAT. §§ 453.01-.18 (1952); KAN. GEN. STAT. ANN. §§ 44-603, 44-607 (1949); MO. REV. STAT. § 295.170 (1952); WIS. STAT. §§ 111.50-.64 (1957). State statutes providing for mandatory arbitration of labor disputes in public utilities should be considered in light of Amalgamated Ass'n of St. Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951), in which the Supreme Court held that under pre-emption principles the Wisconsin statute providing for compulsory arbitration cannot apply to employers subject to the National Labor Relations Act. Similarly, the Florida statute was held inoperative in Henderson v. State, 65 So. 2d 22 (Fla. 1953). See generally Schwartz, *Is Compulsory Arbitration Necessary?*, 15 ARB. J. (n.s.) 189 (1960).

legal theory, is limited to those matters which the parties by their agreement have entrusted to him for decision.

It follows, according to traditional analysis of consensual arbitration, that the arbitrator cannot be the final judge either of the existence or the scope of an agreement to arbitrate except where the parties have so agreed. Under our law, only courts or other statutory tribunals are empowered to enforce agreements, and an arrogation of jurisdiction or authority by an arbitrator may be corrected by judicial review. On the other hand, it is likewise orthodox arbitration law that, if the parties have submitted an issue to arbitration, they are bound by the result even though, had the issue been litigated, a like result reached by a trial court would have involved reversible error.

The legal posture of voluntary arbitration in this country has made it possible for a party upon whom a demand for arbitration has been made to refuse to arbitrate and thus to put the proponent to the necessity of asking a court to compel arbitration. The respondent might predicate his resistance on any of the following grounds: that a legally binding and enforceable agreement to arbitrate does not exist; that the specific issue raised by the proponent's demand is not arbitrable under a valid arbitration agreement; or that the proponent seeks a kind of relief that is beyond the contractual authority of the arbitrator to grant. Alternatively, the respondent, having proceeded with arbitration while preserving his claim of non-arbitrability, may force judicial review by refusing to comply with the award; in this situation the proponent is again forced to seek judicial assistance, this time for the enforcement of the award. When such questions have been raised in either of these situations, the courts have always been available to resolve the issues.

There has been no special problem by virtue of this juridical fact where a valid (*i.e.*, legally binding) agreement to arbitrate has stipulated in clear terms the issue or issues to be decided in a specific case as well as the scope of authority of the arbitrator. Typically, however, "grievance arbitration" (to use a labor relations colloquialism) rests on some provision in the basic collective bargaining agreement which makes arbitration the terminal point in the grievance procedure. The arbitration provision in such case is necessarily broad, even though it may contain exceptions and limitations. Typically, the agreement also provides, either *in haec verba* or in substance, for the arbitration only of disputes "concern-

ing the interpretation and application of some provision or provisions of this agreement." The use of this kind of contractual language makes it possible for a party opposing arbitration of a particular grievance (normally the employer) to contend that the claim is not arbitrable if the labor agreement cannot reasonably be construed to contain a commitment by such party on the basis of which the grievance could be sustained. In numerous instances, courts accepting this approach have either stopped arbitration *ad limine* or refused to enforce awards.

This may seem unobjectionable, but the difficulty in most such cases has been that the disposition of the issue of arbitrability thus presented has required the court to examine and interpret one or more of the substantive provisions of the labor agreement and thus, in reality, to decide the merits of the grievance under the guise of determining arbitrability. This kind of judicial intervention has been severely criticized on the ground, basically, that it was the arbitrator's, not the court's, interpretation of the agreement for which the parties supposedly bargained when they agreed to use the arbitration process.[4]

Judicial intervention probably has occurred with greatest frequency and success where the claim made by the party seeking arbitration has rested either on an express provision of the labor agreement which, on its face, did not appear to support the claim or on an obligation not stated expressly but alleged to be implicit in the agreement. Illustrative of the former is the (one-time) leading *Cutler-Hammer* decision,[5] in which it was held that an express contractual commitment by the employer to meet and discuss with the Union "the payment of a bonus" could not support a grievance based on the employer's refusal to pay a bonus following such discussion. Illustrative of the latter are a number of cases where the grievance protested the subcontracting or contracting out of work of a kind which had been or could be performed by bargaining unit employees and the agreement contained no specific provision on this subject.[6]

4. See Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in PROCEEDINGS OF THE TWELFTH ANN. MEETING, NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW 24 (1959); Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration*, 2 LAB. L.J. 502 (1951); Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. CHI. L. REV. 616 (1950); Summers, *Judicial Review of Labor Arbitration*, 2 BUFFALO L. REV. 1 (1952).

5. International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

6. See, *e.g.*, Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706

Problems concerning the role of the judiciary in relation to the arbitration process eventually reached the Supreme Court. The initial and most important development occurred in 1957, when the Court in *Lincoln Mills* decided that a provision for the use of arbitration as the terminal point in the grievance procedure was specifically enforceable as a matter of federal law under section 301 of the Labor Management Relations Act of 1947, provided the jurisdictional requirements were met.[7] This decision laid to rest for all practical purposes the hoary common-law judicial reaction against the enforceability of agreements to arbitrate future disputes. In addition, the decision meant that the Court would inevitably have to deal with the other kinds of arbitrability issues to which we have referred. The initial confrontation occurred in 1960.

B. *Analysis of the 1960 Cases*

The so-called "Trilogy" of 1960 consisted of three cases in which, in each instance, the union involved was the United Steelworkers of America. The cases have been stated, dissected, and critically examined to the point that we now have a wealth of literature concerning them. A brief review of the issues presented and the decisions is, nevertheless, desirable as part of our background recital.

In *Warrior & Gulf*,[8] the grievances brought by the Union protested the contracting out of certain maintenance work clearly encompassed by the bargaining unit. There was a layoff situation at the time the grievances were filed which, in part, was due to the contracting out of such work. The labor agreement was silent on the subject of contracting out; however, it undoubtedly con-

(7th Cir. 1960); United Steelworkers v. Warrior & Gulf Nav. Co., 269 F.2d 633 (5th Cir. 1959), *rev'd*, 363 U.S. 574 (1960); Dairy Workers v. Grand Rapids Milk Div., 160 F. Supp. 34 (W.D. Mich. 1958); United Dairy Workers v. Detroit Creamery Co., 30 CCH Lab. Cas. ¶ 70115 (Mich. Cir. Ct. 1956); Crivelli v. University Loudspeakers, Inc., 195 N.Y.S.2d 393 (Sup. Ct. 1959). *Contra*, Local 1912, International Ass'n of Machinists v. United States Potash Co., 270 F.2d 496 (10th Cir. 1959).

7. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). See generally Aaron, *On First Looking Into the Lincoln Mills Decision*, in PROCEEDINGS OF THE TWELFTH ANN. MEETING, NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW 1 (1959); Bickel & Wellington, *Legislative Purpose and the Judicial Process—The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Bunn, *Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635 (1959).

8. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

tained recognition, wage, and seniority provisions. The agreement also contained a no-strike provision. Excluded from the arbitration process were matters that were "strictly a function of management," but otherwise the arbitration clause was unusually broad. It stated:

> "Should differences arise between the Company and the Union or its members . . . as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences in the following manner [referring to the grievance and arbitration procedure]."

In a suit by the Union under section 301 to compel arbitration, the district court granted the Company's motion to dismiss,[9] holding that the agreement did not confide in an arbitrator the right to review the defendant's business judgment in contracting out work and that contracting out was strictly a function of management within the meaning of the exclusionary language of the arbitration clause. The court of appeals affirmed,[10] but the Supreme Court reversed and the Company was forced to arbitrate.

In *American Manufacturing*,[11] the question was whether the Company was required to submit to arbitration a grievance based on its refusal to reinstate an employee who had suffered an industrial injury. In a consent decree settlement of a workmen's compensation claim, the employee had been awarded a lump-sum payment plus costs on the basis that he had incurred a permanent partial disability of twenty-five per cent. His subsequent demand for reinstatement was predicated on a statement by his physician (who had supported the earlier claim of permanent partial disability) that the employee "is now able to return to his former duties without danger to himself or to others." Contractually, the demand was based on a provision in the seniority article of the labor agreement which recognized "the principle of seniority as a factor in the selection of employees for promotion, transfer, layoff, re-employment, and filling of vacancies, where ability and efficiency are equal." The arbitration clause was standard in that it permitted arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement."

9. 168 F. Supp. 702 (S.D. Ala. 1958).
10. 269 F.2d 633 (5th Cir. 1959).
11. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

The district court and court of appeals refused to require the Company to arbitrate,[12] although they disagreed on the basis of decision. The district court used an estoppel theory; the court of appeals held that estoppel did not go to the question of arbitrability, but it examined the cited seniority provisions and concluded that the grievance was "a frivolous, patently baseless one" and hence not within the arbitration clause. Again, the Supreme Court reversed and ordered arbitration.

In *Enterprise*,[13] the grievance sought the reinstatement of certain employees who had been discharged because they had left their jobs in protest against the discharge of a fellow employee. The Company refused to arbitrate the grievance, but was ordered to do so by a federal district court. The arbitrator's decision reduced the penalty of discharge to a ten-day disciplinary layoff and ordered the grievants reinstated with back pay adjusted for the ten-day penalty. The decision was handed down five days after the labor agreement had expired, and the Company refused to comply with the award on the ground, *inter alia*, that the arbitrator lacked the authority either to order back pay for any period subsequent to the expiration date of the labor agreement or to order reinstatement. The district court directed the Company to comply with the award,[14] but the court of appeals reversed on the ground urged by the Company.[15] The Supreme Court, however, once more upheld the authority of the arbitrator.

Seven Justices concurred in these decisions. Mr. Justice Whittaker dissented, and Mr. Justice Black did not participate. The principal opinion for the majority was written by Mr. Justice Douglas. Mr. Justice Frankfurter did not join in this opinion, but concurred in the results in each case. Justices Brennan and Harlan, while joining the Douglas opinion in each case, also added "a word" in *Warrior & Gulf* and *American Manufacturing*.

The decisions have been viewed as indicating a strong federal policy favoring the arbitration process as a means of resolving disputes concerning the interpretation or application of collective bargaining agreements and as restricting the role of the courts in this area.[16] This interpretation, we think, is correct, although

12. 264 F.2d 624 (6th Cir. 1959).
13. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
14. 168 F. Supp. 308 (S.D. W. Va. 1958).
15. 269 F.2d 327 (4th Cir. 1959).
16. See, *e.g.*, Davey, *supra* note 1; Gregory, *supra* note 1, at 886; Hays, *supra* note 1, at 919-34; Meltzer, *supra* note 1, at 485-87; Smith, *supra* note 1; Wallen, *Recent*

it derives its principal support from the content of the opinions, especially the opinion by Mr. Justice Douglas, rather than from the specific dispositions of the issues presented. That is to say, we think *Warrior & Gulf* and *American Manufacturing* were correctly decided even if the Court had adopted the *Cutler-Hammer* approach as the basis for determining whether to order the cases to go to arbitration. The decision in *Enterprise* would be more difficult to defend on the basis of pre-existing standards, and, apart from what was said in the opinions, it provides some support for the view that the Court intended to lay down some new principles of labor dispute arbitration law.[17] In any event, the Court in fact expressly repudiated *Cutler-Hammer* and like approaches to arbitrability issues[18] and in broad and sweeping language directed the courts not to intercept the arbitration process and not to upset arbitration results except where judicial intervention is warranted under standards enunciated in the opinions.

The problem of arbitrability remains for courts, however, because the Supreme Court could not escape the basic proposition that so long as arbitration is consensual, arbitrability must be a litigable issue. This was expressly recognized in *Warrior & Gulf* (although, perhaps significantly, only in a footnote to the opinion[19]) and is especially important in the context of the standard type of arbitration clause contained in the *American Manufacturing* agreement. The Court could have held, giving literal effect to the language of this provision, that the parties thereby indicated an intent to give the arbitrator the authority to determine the arbitrability issue, along with other issues, as a matter of contract interpretation. But despite its strong sympathy for the arbitration process, the Court was unwilling to accept this "bootstraps" approach to the resolution of the issue of arbitrability, presumably (the rationale not being explicated) because it did not believe the parties, by using such standard arbitration language, intended to confer upon the arbitrator the authority finally to determine challenges to his authority or jurisdiction.[20] We think this assessment of contractual

Supreme Court Decisions on Arbitration, 63 W. VA. L. REV. 295, 299 (1961); Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471, 483 (1962).

17. See Smith, *supra* note 1, at 9 n.19.

18. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960).

19. 363 U.S. 574, 583 n.7.

20. The concurring opinion of Justices Brennan and Harlan in the Trilogy is more explicit. Justice Brennan points out that "the arbitration promise is itself a con-

intent was correct, although it is probable that in the vast preponderance of arbitration cases decided even prior to the Trilogy the parties have, in fact, acquiesced in the arbitrator's determination of such jurisdictional issues.

Thus, despite the Trilogy, the judiciary retains a role in relation to the arbitration process in keeping the arbitrator within the bounds of his authority under the contract. The problem for the courts is to determine the appropriate areas and bases of intervention or review, giving due regard to the Trilogy and later pronouncements by the Supreme Court.

Considering at this point only the 1960 decisions, the following propositions seem to have been declared as a matter of federal substantive law with respect to labor agreements subject to enforcement under section 301 of the Labor Management Relations Act of 1947:

> (1) The existence of a valid agreement to arbitrate, and the arbitrability of a specific grievance sought to be arbitrated under such an agreement, are questions for the courts ultimately to decide (if such an issue is presented for judicial determination) unless the parties have expressly given an arbitrator the authority to make a binding determination of such matters.[21]
>
> (2) A court should hold a grievance non-arbitrable under a valid agreement to use arbitration as the terminal point in the grievance procedure only if the parties have clearly indicated their intention to exclude the subject matter of the grievance from the arbitration process, either by expressly so stating in the arbitration clause or by otherwise clearly and unambiguously indicating such intention.
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> (3) Evidence of intention to exclude a claim from the arbi-

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tract" and "the parties are free to make that promise as broad or as narrow as they wish . . . ." He states further:

> "In *American*, the Court deals with a request to enforce the 'standard' form of arbitration clause, one that provides for the arbitration of 'any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement . . . .' Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary. However, the Court finds that the meaning of that 'standard' clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provisions of the contract, because such a dispute necessarily does involve such a construction."

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 571 (1959).

21. Of course, if the very existence of a binding agreement to submit issues of arbitrability to arbitral determination is placed in issue before a court, the court must necessarily determine whether such an agreement has been made.

tration process should not be found in a determination that the labor agreement could not properly be interpreted in such manner as to sustain the grievance on its merits, for this is a task assigned by the parties to the arbitrator, not the courts.

(4) An award should not be set aside as beyond the authority conferred upon the arbitrator, either because of claimed error in interpretation of the agreement or because of alleged lack of authority to provide a particular remedy, where the arbitral decision was or, if silent, might have been the result of the arbitrator's interpretation of the agreement; if, however, it was based not on the contract but on an obligation found to have been imposed by law, the award should be set aside unless the parties have expressly authorized the arbitrator to dispose of this as well as any contract issue.[22]

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22. This proposition, of course, derives from the disposition and opinion in *Enterprise*, where the attack on the award was predicated on the lack of authority in the arbitrator to make *any* award after the expiration date of the labor agreement under which the grievance arose and under which the arbitration process was instituted. The proposition as stated may be broader than actually intended by the Court. If, for example, an arbitrator renders an award in conflict with some specific provision in the agreement limiting his authority, a question would be raised that was not involved in the facts of *Enterprise*.

In Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co., 186 F. Supp. 895 (N.D. 1960), the judge derived the following six general principles from the 1960 Trilogy: (1) Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to do; (2) the courts have the exclusive duty of determining whether the reluctant party has breached the promise to arbitrate—this is not a question to be left to the arbitrator; (3) the court's inquiry is confined and limited to determining whether the reluctant party did agree to arbitrate the grievance—it is not for the court to consider the merits of the grievance; (4) where the exclusion clause is vague and the arbitration clause quite broad, doubt should be resolved in favor of arbitration; (5) the parties to an arbitration agreement may exclude any disputes or grievances; (6) the arbitration agreement, being a matter of contract, should be interpreted in accordance with the intention of the parties as therein expressed and in the light of circumstances surrounding the negotiations for and execution of the agreement.

See also *Report of Special Warrior & Gulf Committee*, in 1963 PROCEEDINGS OF THE ABA SECTION OF LABOR RELATIONS LAW 196-97, in which the following six general propositions with respect to arbitration under collective bargaining agreements were said to have been established by the Trilogy: "(1) Arbitration is a matter of contract, not of law; parties are required to arbitrate only if, and to the extent that, they have agreed to do so. (2) The question of arbitrability under a collective bargaining agreement is a question for the courts, not for the arbitrator, unless the parties specifically provide otherwise in their agreement. (3) Since arbitration under a collective bargaining agreement is an alternative to strike, rather than to litigation, as in commercial arbitration, the traditional judicial reluctance toward compelling parties to arbitrate is not applicable to labor arbitration. (4) When the parties have provided for arbitration of all disputes as to the application or interpretation of a collective bargaining agreement, the courts should order arbitration of any grievance which claims that management has violated the provisions of the agreement, irrespective of the courts' views as to the merits of the claim. (5) When the parties have coupled with a provision for arbitration of all disputes a clause specifically excepting certain matters from arbitration, the courts should order arbitration of a claim that the employer has violated the agreement unless it may be said with positive assurance that the subject matter falls within the exception clause. (6). An arbitral award

An intriguing question not actually presented and not expressly considered in these cases is whether, as a matter of federal law, an arbitrator faced with any of the challenges to his jurisdiction or authority presented in these cases is required to decide such an issue the way the Court decided it (*i.e.*, in favor of jurisdiction or authority) or be subject to reversal if his contrary decision should be brought before a court. It has usually been assumed that the arbitrator, despite the Trilogy, has full discretion to decide any issue properly before him. Thus, for example, on facts like those of *Warrior & Gulf* he has the authority to decide whether the grievance protesting subcontracting is arbitrable.[23] However, the positive statements of Justice Douglas in *American Manufacturing* and *Warrior & Gulf* in support of the arbitrability of the grievances there considered can be read as mandatory rules of interpretation of the relevant contract provisions, and some arbitrators have regarded the Trilogy as dispositive of these kinds of arbitrability issues.[24]

Actually, we believe it makes no difference in cases like these whether an arbitrator holds the grievance arbitrable and then denies it on the merits (if this should be his conclusion) or dismisses it as non-arbitrable. Either form of decision would have to be predicated on the same basic contractual analysis, namely, that there is no provision in the labor agreement which supports the grievance. The legal and practical results are, therefore, the same, and the point of the matter is that either way the arbitrator writes his opinion he is in fact deciding the merits. For this reason, we doubt that the Court would upset an arbitrator's holding of non-arbitrability.

II. The 1962 Trilogy

On June 18, 1962, the Supreme Court rendered another triplet

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should be enforced (absent fraud or similar vitiating circumstance) unless it is clear that the arbitrator has based that award upon matters outside the contract he is charged with interpreting and applying."

23. See, *e.g.*, Allis Chalmers Mfg. Co., 39 Lab. Arb. 1213 (Smith 1962) (subcontracting dispute held arbitrable); Caterpillar Tractor Co., 39 Lab. Arb. 875 (Dworkin 1962) (procedurally defective claim held not arbitrable); Babcock & Wilcox Co., 62-2 P-H Lab. Arb. Serv. ¶ 8761 (McCoy 1962) (revision of labor grade held not arbitrable); Allis Chalmers Mfg. Co., 37 Lab. Arb. 944 (White 1961) (subcontracting dispute held arbitrable); Allegheny Ludlum Steel Corp., 36 Lab. Arb. 1912 (Ryder 1961) (subcontracting dispute held arbitrable).

24. See, *e.g.*, Lake Mills Redi-Mix, Inc., 62-2 P-H Lab. Arb. Serv. ¶ 8377 (Mueller 1962); Union Asbestos & Rubber Co., 39 Lab. Arb. 72 (Volz 1962); Forse Corp., 39 Lab. Arb. 709 (Dworkin 1962).

of decisions of substantial importance to the labor dispute arbitration process. In *Sinclair Refining Company v. Atkinson*[25] it was held that a federal injunction against a strike over arbitrable matters was barred by the Norris-LaGuardia Act,[26] even though the strike was in breach of a contractual no-strike pledge. In the companion case of *Atkinson v. Sinclair Refining Company*[27] (which we shall refer to as *Sinclair II*) the Court held, among other things, that the employer could bring a section 301 suit for damages against the Union for alleged violation of a no-strike provision, since the arbitration clause did not provide for the submission of employer grievances against the Union. In *Drake Bakeries v. Local 50*,[28] on the other hand, it was held that the employer's suit for damages for breach of a no-strike covenant was barred because, under the grievance procedure contained in the applicable agreement, the employer's claim was an arbitrable matter and the arbitration process should have been used.

Sinclair, which involved the availability of a federal injunction against violation of a no-strike provision, has only limited relevance to the subject of this article. With respect to it we will say only that, while the majority opinion makes a fairly persuasive case based upon legislative history, the Court had indicated in earlier decisions that it was quite capable of finding grounds upon which the Norris-LaGuardia Act could be considered inapplicable when policy considerations were deemed to require this result.[29] In our judgment, the Court's refusal to do so in this instance was a disservice to the arbitration process and difficult to understand in the

25. 370 U.S. 195 (1962).

26. 29 U.S.C. §§ 101-15 (1958).

27. 370 U.S. 238 (1962).

28. 370 U.S. 254 (1962).

29. See, *e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (suit to obtain the specific performance of a contract to arbitrate under § 301); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957) (suit to enjoin strikes where Congress provided a compulsory method of determining grievances by the National Railroad Adjustment Board); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (suit to enjoin the use of a discriminatory contract for purposes of ousting employees from their jobs); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944) (suit to enjoin discriminatory practices where no administrative remedy is available); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (suit to enforce the statutory duty of fair representation under the Railway Labor Act); Virginia Ry. v. System Fed'n No. 40, Ry. Employees, 300 U.S. 515 (1937) (suit to enforce employer's duty to bargain under the Railway Labor Act). See generally Comment, *Labor Injunctions and Judge-Made Labor Law—The Contemporary Role of Norris-LaGuardia*, 70 (1962).

light of the favorable attitude toward arbitration exhibited in the 1960 decisions.[30]

Sinclair II and *Drake Bakeries* are both important and germane to our present discussion. Each case involved, among other things, the questions whether the employer's claim for damages against the union for alleged violation of a no-strike pledge was arbitrable, and, if so, whether in consequence a damage action under section 301 was unavailable to the employer. The opinions and decisions, especially in *Drake Bakeries*, appear to give an affirmative answer to the second of these questions. This seems to us to be a proper development of federal labor law. Where the parties have made the arbitration process available for the resolution of a particular issue, it is sound and consistent with the Court's general approbation of the arbitration process to require that that process rather than litigation be used.

For present purposes the Court's dispositions of the arbitrability issues are the most significant aspects of the cases. Mr. Justice White's opinion in *Sinclair II* reiterated that "under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."[31] The 1960 Trilogy was cited. In *Drake Bakeries* this position was reaffirmed.[32] A question which the Court had to face and decide in each case, therefore, was whether under the particular agreement before it the employer's claim for damages against the union was an arbitrable issue. The basis of the Court's determination of this question constitutes its major 1962 contribution to the problems we are here considering.

The contract grievance and arbitration procedure involved in *Sinclair II* contained a broad definition of the term "grievance"

30. For valuable discussions of these cases, see Aaron, *Strikes in Breach of Collective Agreements*, 63 COLUM L. REV. 1027 (1963); Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292 (1963); Dannett, *Norris-LaGuardia and Injunctions in Labor Arbitration Cases*, N.Y.U. 16TH ANN. CONFERENCE ON LAB. 275 (1963); Kirwood, *The Enforcement of Collective Bargaining Contracts*, 15 LAB. L.J. 111 (1964); Marshall, *Enforcing the Labor Contract*, 14 LAB. L.J. 353 (1963); Vladeck, *Injunctive Relief Against Strikes in Breach of the Labor Agreement*, N.Y.U. 16TH ANN. CONFERENCE ON LAB. 289 (1963); Weiss, *Labor Arbitration and the 1961-1962 Supreme Court*, 51 GEO. L.J. 284 (1963); Wellington & Albert, *Statutory Interpretation and the Political Process*, 72 YALE L.J. 1547 (1963).

31. Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).

32. Mr. Justice White stated: "As was true in *Atkinson* . . . the issue of arbitrability is a question for the courts and is to be determined by the contract entered into by the parties." Drake Bakeries Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254, 256 (1962).

which did not necessarily exclude a claim by the employer that the union had disregarded some obligation under the agreement.[33] However, the provisions specifying the various steps of the grievance procedure referred only to grievances presented by employees or the Union's Workmen's Committee. Moreover, the arbitration clause stated that an arbitration board "shall consider only individual or local committee grievances arising under the application of the currently existing agreement" and expressly provided that arbitration could be invoked only at the option of the Union. For these reasons, the Court thought it "unquestionably clear that the contract here involved is not susceptible to a construction that the company was bound to arbitrate its claim against the union for breach of the undertaking not to strike."[34] By way of footnote, the Court significantly added this statement: "We do not need to reach, therefore, the question of whether, under the contract involved here, breaches of the no-strike clause are 'grievances,' i.e., 'differences relating to wages, hours, or working conditions,' or 'grievances' in the more general sense of the term."[35]

In *Drake Bakeries,* on the other hand, the grievance procedure provisions of the contract began with a broad undertaking that the parties would "attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly." Moreover, the specified methods of adjustment, including arbitration, did not expressly exclude employer complaints or grievances, and it was provided that, if a matter was not settled under the intra-plant procedures, "then either party shall have the right to refer the matter to arbitration as herein provided." The Court, finding these provisions easily distinguishable from those involved in *Sinclair II,* held that an employer complaint based upon an alleged breach of the no-strike pledge was arbitrable under the terms of the agreement and that the employer was not excused from its duty to use the arbitration process.

It seems to us that the Court's interpretations of the respective

33. The contract defined a grievance to be ". . . any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations." Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 250 (1962).

34. *Id.* at 241.

35. *Id.* at 242 n.3.

agreements concerning the arbitrability of the employer's claim of breach of the no-strike provision were correct. The negative implication the Court found in the language used in the *Sinclair II* contract provisions detailing the grievance and arbitration procedures was entirely plausible, but not necessarily clear beyond peradventure. However, the result reached was correct in the light of the further facts (which the Court noted but did not rely upon) that the parties in another provision recognized that there was a category of "general disputes" which were to be subject to negotiation, with no mention of arbitration, and that the no-strike clause recognized, by clear implication, a right to strike on matters which could not be "the subject of a grievance."[36] Thus, as stated in the opinion, "the parties did not intend to commit all of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures. . . ."[37]

The decision in *Drake Bakeries* presents greater difficulties. We think the Court correctly interpreted the contract there involved as meaning that employer grievances were intended to be amenable to the grievance and arbitration procedures, especially in the light of the very broad no-strike provision contained in the agreement. But a different interpretation could scarcely have been considered arbitrary or capricious. Moreover, the Court might well have differentiated between the arbitrability of the employer's claim that the Union had violated its no-strike pledge and the availability of the arbitration process to provide a damage remedy. At least prior to the 1960 Trilogy, there had been substantial disagreement among arbitrators[38] and among courts[39] on the question whether this kind of remedy was contemplated by the parties in establishing

36. The no-strike clause provided that "there shall be no strikes . . . (1) For any cause which is or may be the subject of a grievance . . . or (2) For any other cause, except upon written notice by Union to Employer. . . ."

The provision covering "general disputes" provided that disputes general in character or affecting a large number of employees were to be negotiated between the parties. *Id.* at 241 n.1.

37. *Id.* at 241-42.

38. See Reading St. Ry., 8 Lab. Arb. 930 (Simkin 1937); Baldwin-Lima-Hamilton Corp., 30 Lab. Arb. 1061 (Crawford 1958). See generally ELKOURI & ELKOURI, HOW ARBITRATION WORKS 47 (1960).

39. See Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957) (within); UAW v. Benton Harbor Malleable Indus., 242 F.2d 536 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957); United Elec. Workers v. Miller Metal Prods., Inc., 215 F.2d 221 (4th Cir. 1954); Markel Elec. Prods., Inc. v. United Elec. Workers, 202 F.2d 435 (2d Cir. 1953). See generally Erzine, *Nadir of the No-Strike Clause*, 8 LAB. L.J. 769, 791 (1957); Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1204 (1962).

the arbitration process. It is arguable that, except as the parties expressly indicated otherwise, they intended to confine the arbitrator to the kinds of remedies traditional to the arbitration process or at least intended to exclude a remedy which would tax the capabilities of the arbitration process by presenting problems (of proof, prolonged hearings, and the like) not ordinarily present and not necessarily within the expertise of the arbitrator.[40]

The question arises whether *Sinclair II* and *Drake Bakeries* laid down federal rules of interpretation that are to be mandatory upon arbitrators when faced with similar arbitrability issues. In discussing this problem in relation to the 1960 Trilogy, we concluded that the Court would very likely not permit the arbitrator's decision to be reversed no matter which way he decided the issue of arbitrability, because, either way, he is really deciding the merits. But analysis of the two 1962 cases with respect to this question involves different considerations.

The essential point of the 1960 cases is that the Court there issued a caveat against judicial interference with the arbitration process so long as the arbitrator is deciding a contract issue, including an issue of arbitrability which is inherently intertwined with the contract merits of the particular grievance. In the 1962 cases the narrow question presented was whether the employer's suit for damages should be stayed on the ground that the arbitration process was available to the employer. Approval of the principle that the arbitration process, where it is available, should be used in the first instance left the Court with the kind of issue presented in 1960, namely, whether it should compel arbitration. In the two cases different results were reached. In neither case did the Court state (nor, for that matter, did it in 1960) that, if the arbitrability issue had been presented to an arbitrator in the first instance, he would have been free to make an independent, final decision on that issue contrary to the conclusion reached by the Court.

It seems to us to be inescapable, however, that the Court in *Sinclair II* did indeed lay down a federal rule of interpretation which cannot with impunity be disregarded by arbitrators. This is almost necessarily so as a matter of inherent logic, since the Court refused

40. Mr. Justice Harlan, dissenting in *Drake Bakeries*, took this position. See Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254, 267 (1962). Consider also the following language by Arbitrator Crawford: "Damages for strikes and lockouts in violation of the contract is a remedy normal to the Courts—but not to arbitration. When parties seek such extra-arbitral remedy, the proper tribunal is, and has been, the courts. . . ." Baldwin-Lima-Hamilton Corp., 30 Lab. Arb. 1061, 1064 (1958).

to permit the employer's claim in that case to be submitted to the arbitration process. There is an obvious distinction between this kind of result and the results reached in the 1960 Trilogy and in *Drake Bakeries,* where the Court required the matter to be submitted to arbitration. The Court, standing at the pinnacle of the federal judiciary, has the ultimate authority when the legal foundation is section 301 of the LMRA of 1947. When it decides that under certain kinds of contract provisions the intention to exclude a given claim from the arbitration process is so clear that arbitration should not be ordered despite the 1960 decisions, it must surely be applying the basic rule, recognized in the 1960 Trilogy and reiterated in the 1962 cases, that arbitrability is ultimately a matter for the judiciary. When the decision is against arbitrability (*i.e.*, against requiring the matter even to be submitted to the arbitration process), there is obviously no room for a contrary interpretation by an arbitrator. Moreover, the opinion in *Sinclair II* uses language, noted above, which indicates that the Court could not conceive of any other interpretation of the pertinent contract provisions.

Drake Bakeries, however, presents additional problems. First, in this case, unlike *Sinclair II,* the Court ordered arbitration as it had done in the 1960 Trilogy cases; thus the interpretation of the decision in relation to the respective roles of court and arbitrator becomes more difficult. Moreover, the reasons for requiring arbitration which explain the 1960 cases were applicable to some extent in *Drake Bakeries.* As in *Warrior & Gulf,* there was a broad arbitration clause, and as in *American Manufacturing,* there was an alleged breach of a specific provision of the labor agreement. Therefore, it could not reasonably be contended, as in *Sinclair II,* that the claim was clearly intended to be excluded from the arbitration process. In addition, the arbitrability issue in *Drake Bakeries* was partly intertwined with the merits, as in the 1960 cases, since there was a serious question whether the union's conduct constituted a strike within the meaning of the agreement. This issue was peculiarly within the expertise of an arbitrator. On the other hand, whether the parties intended to empower the arbitrator to enforce the no-strike provision and to provide a damage remedy were issues not linked with the merits. Therefore, in contrast with the 1960 cases, in this situation if the arbitrator dismisses the claim it makes a difference whether he does so on the merits or on the ground that he lacks arbitral jurisdiction or authority. A decision predicated on

the latter ground would permit the employer to pursue his judicial remedy.

Our view is that *Drake Bakeries* should not be interpreted as laying down a mandatory federal rule of construction, binding upon an arbitrator, even with respect to the kind of contract provisions and the fact situation there presented. By the same token, we would argue that the case does not indicate how the Court would react on the issues of arbitrability and arbitral authority under a bilateral arbitration provision where there is clearly a breach of the no-strike clause and the only issue concerns the nature of the remedy. Our guess is that the Court would order the employer to submit his claim for damages or other relief to the arbitration process, even though the issues do not lend themselves as readily to arbitration as in *Drake Bakeries*. Likewise, we feel confident that, if the arbitrator were to reject jurisdiction (at least over a claim for damages), he would not be held to have committed reversible error.

III. The 1964 Cases

Three cases of major importance, and two of uncertain or little significance, in the development of federal law concerning the labor dispute arbitration process were decided by the Supreme Court in 1964. Each involved an issue or issues which we subsume under the general caption "arbitrability and related matters." In the first category are *Carey v. Westinghouse Elec. Corp.*,[41] *Local 721 v. Needham Packing Co.*,[42] and *John Wiley & Sons, Inc. v. Livingston*.[43] In the second category are *Independent Petroleum Workers of America, Inc. v. American Oil Co.*,[44] and *Piano and Instrument Workers Union v. W. W. Kimball Co.*[45]

A. *The Carey Case*

IUE was the certified bargaining representative of "all production and maintenance employees" at the plant where the controversy arose; "salaried, technical" employees were specifically excluded. IUE and Westinghouse were parties to an agreement which provided for arbitration of unresolved disputes, including those involving the "interpretation, application or claimed violation" of

41. 375 U.S. 261 (1964).
42. 376 U.S. 247 (1964).
43. 376 U.S. 543 (1964).
44. 377 U.S. 930 (1964), *rehearing den.*, 85 Sup. Ct. 639 (1965).
45. 85 Sup. Ct. 441 (1964).

the agreement. IUE filed a grievance asserting that certain employees represented by Westinghouse Independent Salaried Unions (Federation) were performing production and maintenance work. Federation represented a bargaining unit of "all salaried, technical" employees; from this unit "all production and maintenance employees" were excluded. Westinghouse refused to arbitrate, claiming the controversy concerned a representation matter within the exclusive jurisdiction of the National Labor Relations Board, although the Board's jurisdiction had not, in fact, been invoked. IUE petitioned the Supreme Court of New York for an order compelling arbitration, but such order was refused on the ground urged by Westinghouse. This decision was affirmed on appeal through the New York appellate courts.[46] The Supreme Court, in an opinion by Mr. Justice Douglas, with Justices Black and Clark dissenting, reversed and held that the dispute should go to arbitration.

The Court held that, whether the dispute was jurisdictional or representational in nature as between the two unions and the Company, the availability of recourse to the NLRB did not preclude contract arbitration. In reaching this conclusion, the Court relied upon *Smith v. Evening News Association*,[47] in which it had been held that the existence of a remedy under the NLRA for an unfair labor practice did not bar individual employees from seeking damages for breach of a duplicative provision in a collective bargaining agreement. The opinion states: "We think the same policy considerations are applicable here . . . ."[48] Precisely what those policy considerations are was not indicated either in *Carey* or in the opinion of Mr. Justice White in the *Smith* case. However, in the latter, reference was in turn made to *Local 174, Teamsters Union v. Lucas Flour Co.*,[49] *Charles Dowd Box Co. v. Courtney*,[50] and *Sinclair II*, so presumably the policy considerations underlying those decisions were regarded as applicable.

In *Dowd Box* and *Lucas Flour* it had been argued that the courts lacked jurisdiction because the protested conduct was arguably protected or prohibited by the National Labor Relations Act and therefore within the exclusive jurisdiction of the NLRB. However, the Court differentiated suits to enforce collective bargaining

46. Carey v. Westinghouse Elec. Corp., 15 App. Div. 2d 7, 221 N.Y.S.2d 303 (1961), *aff'd*, 230 N.Y.S.2d 703, 184 N.E.2d 298 (1962).
47. 371 U.S. 195 (1962).
48. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 268 (1964).
49. 369 U.S. 95 (1962).
50. 368 U.S. 502 (1962).

agreements, whether brought in state or federal courts, from attempts to invoke state labor law regulating matters arguably within the jurisdiction of the NLRB. With respect to the latter the Court has applied broad pre-emption principles.[51] The opinion noted that "Congress expressly rejected that policy [pre-emption] with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices" and "instead, . . . deliberately chose to leave the enforcement of collective bargaining agreements 'to the usual processes of law.' "[52] Underlying *Dowd Box*, however, was the hypothesis that, in a suit, whether in a state or federal court, to enforce a collective bargaining agreement over which a federal court would have jurisdiction under section 301, federal rather than state law must apply. Thus, the decision in *Carey* was simply an extension of the view that pre-emption is inapplicable in the enforcement of collective bargaining agreements, regardless of whether the forum is a court or an arbitrator.

This result seems appropriate in the light of the earlier decisions to which the Court referred. Moreover, the rationale of the decision implies that as a matter of federal law an arbitrator not only may, but *must*, assume jurisdiction, despite a claim of concurrent NLRB jurisdiction. Otherwise, the arbitrator would be depriving a party to the agreement of a remedy for which he has contracted. Logically this would be true even when the NLRB has previously assumed jurisdiction and decided the unfair labor practice issue. If the two decisions should, perchance, place the employer or the union in an incompatible position, the situation would be one to which the following observation in *Smith* would be applicable: "If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise."[53] It would scarcely be surprising, however, to find

51. Some of the more important pre-emption cases are San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Garner v. Teamsters Union, 346 U.S. 485 (1953); Hill v. Florida, 325 U.S. 538 (1945). See generally Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); McCoid, *State Regulation of Labor Management Relations*, 48 IOWA L. REV. 578 (1963); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6 (1959); Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593 (1948); Note, *Procedural Problems of Policing Pre-emption*, 18 RUTGERS L. REV. 78 (1963).

52. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 513 (1962).

53. Smith v. Evening News Ass'n, 371 U.S. 195, 197-98 (1962). In the following two

courts refusing to order arbitration, and arbitrators refusing to proceed, where an issue, although submitted under the contract, has already been resolved by the NLRB. Both court and arbitrator might be expected to inquire, at least, whether the assumption of arbitral jurisdiction would either be an exercise in redundancy or futility.

A second arbitrability issue in *Carey* arose out of the fact that "only one of the two unions involved in the controversy has moved the state courts to compel arbitration."[54] Therefore, as the Court further stated, "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute."[55] The Court thus recognized that the non-participating union would not be bound by the results of the arbitral decision, but was not particularly troubled by this problem since, if the decision of the arbitrator were against the participating union, as it might well be, it would not adversely affect the non-participating union and might, "as a practical matter, end the controversy."[56]

We wonder just how seriously to take the Court's disposition of this facet of the case. The writ of certiorari was limited to the following question: "Whether a state court is pre-empted of its jurisdiction to enforce arbitration provisions of a collective bargaining agreement by compelling arbitration of a grievance alleging that the employer violated the agreement by assigning work covered by the agreement to employees outside the collective bargaining unit and refusing to apply the terms and provisions of the agreement to the performance of such work."[57] Accordingly, the question

cases the court was confronted with a situation in which the NLRB had previously assumed jurisdiction: Application of Buchholz, 15 App. Div. 2d 394, 224 N.Y.S.2d 638 (1962); International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485 (2d Cir. 1964). In the *Buchholz* case the court held that arbitration of an employee's discharge was barred where the union had previously filed unfair labor practice charges. The NLRB had ruled that the discharge was lawful, and its ruling had been upheld on appeal. In the *General Electric* case a NLRB adjudication of a § 8(b)(4)(D) violation and the issuance of a cease-and-desist order did not bar arbitration concerning subcontracting. Professor Sovern agrees that courts must assume jurisdiction; otherwise § 301 would be "emasculated." However, he believes that the pre-emption cases should not be totally irrelevant and that NLRB jurisdiction should be available in cases where judicial enforcement is inappropriate. According to Professor Sovern, "the courts should in any event retain their discretionary power to delay decision when, for example, a controlling Board determination appears imminent." Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529, 553 (1963).

54. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 265 (1964).
55. *Ibid.*
56. *Ibid.*
57. Carey v. Westinghouse Elec. Corp., 372 U.S. 957 (1963).

whether the grievance should be held non-arbitrable because the Federation was not a party to the arbitration proceeding was not actually an issue presented for decision, although it was argued.[58] Nevertheless, the Court specifically recognized the problem and seemed to feel that a judicial hands-off policy was appropriate.[59]

So reading the decision, it appears to establish a federal rule of substantive law that there is no lack of arbitral jurisdiction merely because the proceeding and award might adversely affect a non-participant. (Of course, the proceeding must not involve a lack of due process in other respects.) This is a repudiation of the contrary view which had been taken by the California Supreme Court in *Local 770, Retail Clerks v. Thriftimart, Inc.*[60] We think the Court's position here is sound despite the obvious problems presented, since in similar cases arbitrators have traditionally exercised jurisdiction and the arbitration decision may have the therapeutic value which, in the Court's view, is one of the virtues of the arbitration

58. See Brief for Respondent, p. 37, Reply Brief for Petitioner, pp. 14, 15, Brief for United States of America as Amicus Curiae, pp. 18-20, Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

59. The court took this position in an earlier case in which the National Railroad Adjustment Board was the arbitral tribunal under the Railway Labor Act. In Whitehouse v. Illinois Cent. R.R., 349 U.S. 366 (1955), the Board notified a railroad and one of two unions engaged in a jurisdictional dispute that it had assumed jurisdiction. Prior to a decision by the Board, the railroad filed an action alleging that the Board's failure to give notice to both unions violated the Railway Labor Act and that the absent union could later prosecute its own claim. The Supreme Court upheld Board jurisdiction. Mr. Justice Frankfurter stated:

> "The Board has jurisdiction over the only necessary parties to the proceeding and over the subject matter. If failure to give notice be treated as an error, in an award in favor of Railroad it would constitute at best harmless error which could not be made the basis of challenge by Railroad, Telegraphers or Clerks. Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it. The inevitable result is to disrupt the proceedings of the Board. Its decision has already been delayed for more than two years." *Id.* at 373.

60. 59 Cal. 2d 421, 380 P.2d 652 (1963). In this case, the issue submitted to arbitration was whether a collective bargaining agreement applied to the employees of a newly acquired subsidiary. Although the subsidiary was never a party to the arbitration proceeding, the arbitrator found the collective bargaining agreement to be applicable to the subsidiary's stores. The California Supreme Court found that the subsidiary would be materially affected by the arbitrator's award and that failure to serve notice on the subsidiary was a denial of due process. Emphasizing the consensual nature of arbitration, Justice Traynor said:

> ". . . MORE was not a party to the collective bargaining contract and did not join in the submission of the controversy to the arbitrator. Thus, the crucial issue is whether there can be a valid arbitration award in the absence of a party directly affected by the award. The substantive federal law of collective bargaining agreements affords no solution to this question. 'Until it is elaborated by the federal courts we assume it does not differ significantly from our own law.' (*McCarroll v. Los Angeles County, etc. Carpenters*, 49 Cal. 2d 45, 60, 315 P.2d 322)." *Id.* at 426, 380 P.2d at 655.

For a discussion of the *Thriftmart* case, see Jones, *Autobiography of a Decision*, 10 U.C.L.A.L. Rev. 987, 1004 (1963).

process. Moreover, as in the case of the arbitrability issue involving concurrent NLRB jurisdiction, we read the Court's opinion in *Carey* as meaning that as a matter of federal law an arbitrator may not refuse to assume jurisdiction simply because of non-participation of an interested third party, since the parties to the particular contract under which he serves have bargained for the arbitral remedy.

In reaching this conclusion we apparently are in disagreement with Professor Edgar Jones, who implies in a recent provocative discussion that despite *Carey* an arbitrator probably remains free to reject jurisdiction in such a case.[61] He appears to rely on the later *Wiley* decision in which (as noted below) it was held that strictly procedural matters are usually for the arbitrator. But the procedural matter involved in *Wiley* was an alleged lack of compliance with the specified steps of the contract grievance procedure. This is a quite different kind of procedural matter from that involved in *Carey*. The Court's rationale in *Wiley* was that the procedural questions were intertwined with the merits of the dispute and thus within the province of the arbitrator to decide. We see the non-party issue in *Carey* as raising a much more fundamental question of the propriety of assuming jurisdiction when the award may be unenforceable against a non-participating union whose interests are affected. Involved in this kind of jurisdictional issue is not an interpretation or application of any part of the labor agreement. Involved, instead, is the question—essentially one of federal law and policy—whether the arbitrator may or must decline to proceed because of the non-participant's interest. The rule, we gather, is that jurisdiction exists to proceed bilaterally, even though the award may be unenforceable against the non-participant. Since this affects the basic authority of the arbitrator to act, we are unable to perceive on what theory he could properly refuse to exercise the authority granted him by the agreement.

This aspect of *Carey* points up one of the weaknesses of the arbitration process. Obviously, an award which may not finally dispose of the issues as to all interested and potentially affected persons can be an exercise in futility. Ideally, there should be a forum available

61. Jones, *An Arbitral Answer to a Judicial Dilemma*, 11 U.C.L.A.L. REV. 327, 332-36 (1964). Professor Jones ingeniously suggests the device of compulsory "trilateral" arbitration as an appropriate solution to the problems inherent in this kind of case. See Jones, *supra*; Jones, *supra* note 60; and Jones, *Power and Prudence in the Arbitration of Labor Disputes*, 11 U.C.L.A.L. REV. 675, 772-75 (1964). For a criticism of the suggested approach, see Bernstein, *Nudging and Shoving All Parties to a Jurisdictional Dispute Into Arbitration: The Dubious Procedure of* NATIONAL STEEL, 78 HARV. L. REV. 784 (1965).

which has the authority to bind any interested non-participant. Professor Jones has suggested that arbitrators, like courts, may well be authorized under the principles announced in *Lincoln Mills* to undertake "arbitral innovation," even to the point of using "arbitral interpleader" in a case like *Carey*.[62] He recognizes, however, the consensual and practical problems that would be presented if the "impleaded" non-participant refused to consent to being a participant. He therefore suggests that, at least until the authority of an arbitrator to proceed in this fashion becomes established by judicial edict (presumably as part of the emerging federal law), the arbitrator should proceed with "trilateral" arbitration (after determining that this is appropriate) over the protest of any interested party only if, in a suit brought under section 301, the court approves the use of this device. It may be that this is one area in which some legislative solution will ultimately be necessary.

B. *The Needham Case*

The question in *Needham* was whether, if, as alleged, a strike protesting the discharge of an employee violated a no-strike provision, the employer was relieved of the obligation to arbitrate grievances subsequently filed by the union protesting both the earlier discharge and the discharge of employees involved in the strike. The employer had refused to recognize the grievances on the ground that by striking the union had "repudiated and terminated the labor agreement." Suit was thereupon instituted in an Iowa court to compel arbitration. That court held "the Union had waived its right to arbitrate the grievances filed by its walkout," and this holding was affirmed by the Iowa Supreme Court.[63] On certiorari, this decision was unanimously reversed in an opinion by Mr. Justice Harlan. He stated: "The law which controls the disposition of this case is stated in *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 370 U.S. 254."[64] Since this was the basis of the decision, it added nothing to the federal law of arbitrability on the issue here involved that was not developed earlier in *Sinclair II* and *Drake Bakeries*.

C. *The Wiley Case*

Wiley was another case in which the Union sought to compel arbitration through a suit under section 301. Again the decision of

62. Jones, *supra* note 61; Jones, *supra* note 60.

63. Local 721, United Packinghouse Food Workers v. Needham Packing Co., 254 Iowa 882, 119 N.W.2d 141 (1963).

64. Local 721, United Packinghouse Food Workers v. Needham Packing Co., 376 U.S. 247, 250 (1964).

the Supreme Court was unanimous, although Mr. Justice Goldberg did not participate. In the opinion written by Mr. Justice Harlan it is stated that "the major questions presented are (1) whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer, and, if so, (2) whether the court or the arbitrator is the appropriate body to decide whether procedural prerequisites which, under the bargaining agreement, condition the duty to arbitrate have been met."[65] The Second Circuit, reversing the district court, had held that an order compelling arbitration should be issued.[66] This decision was affirmed.

It was held, correctly in our judgment, that the question whether the arbitration provisions of the agreement survived the corporate merger was for a court to decide, when submitted to that forum, and that under the circumstances the obligation had survived. The question of so-called "procedural arbitrability" was whether the district court should have referred to the arbitrator the effect of an alleged failure to file a timely grievance. It was held that this was a matter to be decided by the arbitrator, not the court. The Court stated:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear its final disposition should be left to the arbitrator. *Even under a contrary rule, a court could deny arbitration only if it could confidently be said not only that a claim was strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether,* and not merely limit or qualify an arbitral award. In view of the policies favoring arbitration and the parties' adoption of arbitration as a preferred means of settling disputes, such cases are likely to be rare indeed. In all other cases, those in which arbitration goes forward, the arbitrator would ordinarily remain free to reconsider the ground covered by the court insofar as it bore on the merits of the dispute, using the flexible approaches familiar to arbitration. Reservation of 'procedural' issues for the courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort."[67]

In essence, the basis of the decision on this issue was that the

65. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 544 (1964).
66. Livingston v. John Wiley & Sons, Inc., 313 F.2d 52 (2d Cir. 1963).
67. 376 U.S. 543, 557-58 (1964). (Emphasis added.)

"procedural disagreements," to use the Court's term, were aspects of the merits of the dispute and that such matters should usually be decided by arbitrators, not courts. But, despite the broad language employed, it is not clear that the Court will give the arbitrator full discretion to determine whether to dismiss a grievance because of some alleged purely procedural defect in the presentation or processing of the complaint. The doubt arises from the italicized portion of the excerpt quoted above and from the fact that the Union's failure to follow strictly the procedural requirements of the agreement may have been caused by the uncertainty which existed with respect to the survival of the agreement. Possibly a different conclusion as to the role of the courts would be reached where, for example, the arbitration clause states explicitly that an arbitrator has no jurisdiction over a grievance which has not been processed in the manner provided by the contract, especially if there is no question as to the applicability of the agreement.

D. *The American Oil Company Case*

In *Independent Petroleum Workers v. American Oil Company*, another subcontracting case, the district court held that the employer was required to arbitrate a grievance protesting the contracting out of certain maintenance work, although, as in *Warrior & Gulf*, the labor agreement did not deal explicitly with subcontracting. The Seventh Circuit reversed on the grounds (1) that the grievance was not arbitrable despite the 1960 Trilogy cases, and (2) that the Union was "barred by collateral estoppel" from seeking a decree compelling arbitration.[68] The latter holding was based upon the fact that in an earlier case between the same parties involving the same type of dispute and the same arbitration provisions (although contained in an earlier agreement) a decision against arbitrability had been rendered and had not been appealed.[69] On certiorari, the decision was affirmed per curiam by an equally divided Court, Mr. Justice Goldberg not participating.[70]

One problem in appraising this decision arises out of the fact that *American Oil* is factually distinguishable from *Warrior & Gulf* and the other 1960 cases in the type of arbitration clauses involved.

68. Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1964).

69. Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706 (7th Cir. 1960).

70. Independent Petroleum Workers v. American Oil Co., 379 U.S. 130 (1964).

The arbitration provisions before the Court in the 1960 cases were very broad, and in *Warrior & Gulf* the provision was limited only by a general restriction that "matters . . . strictly a function of management" were not subject to arbitration. In *American Oil,* on the other hand, the arbitration provisions were structured in an entirely different way. In some respects they were broader than those before the Court in 1960, since not only questions "involving or arising from applications, interpretations or alleged violations of the terms of this agreement," but also questions of applications or interpretations of or alleged non-compliance with "past policies, practices, customs or usages relative to working conditions" were declared arbitrable.[71] In one respect, however, the arbitration clause was arguably more restrictive than those involved in the 1960 cases: it contained a provision to the effect that the Company would bargain with the Union with respect to matters "which are not covered in this Agreement" but "either party shall have the right to refuse to arbitrate any such matter"; in the event of such refusal, the no-strike obligation was suspended as to that matter.[72] The Seventh Circuit did not base its decision on the arbitrability issue squarely

71. Section 10 of the agreement provided in part as follows:
"A. Questions which may be referred to arbitration shall be limited to:
1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
2. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of arbitration awards and written agreements not incorporated in this agreement.
3. Questions of applications or interpretations of or alleged non-compliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:
(a) the modification by the Company of any of said policies, practices, customs and usages, or
(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or
(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement." 275 F.2d 706, 707.

In the first case the Union relied on § 10A3 of the agreement in support of its claim that the grievances were arbitrable. There was evidence in the record that the past practice had been to use both bargaining unit employees and outside contractors in the performance of maintenance work at the Company's Whiting Refinery. There was also evidence the Union had sought unsuccessfully in two separate contract negotiations to obtain inclusion in the agreement of specific restriction on subcontracting.

72. This was § 10D, which provided: "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." 324 F.2d 903, 905.

on this provision, but it did seem to regard it as significant.[73] We doubt that this provision, or any of the others cited, or any of the background facts of the case, provide a proper basis for distinguishing *American Oil* from the 1960 cases. But the possibility exists that one or more of the Justices took a different view. It is also possible, of course, that one or more of the Justices who voted for affirmance are in disagreement with the 1960 decisions, or at least with the broad interpretations given to them.

Another difficulty in attempting to determine the importance of *American Oil* in relation to the law concerning arbitrability issues is that the Court evidently had before it both the arbitrability and the collateral estoppel questions. It is possible that one or more of the affirming Justices thought the estoppel matter dispositive, despite the Union's contention that the doctrine was inapplicable, because the intervening decisions in the 1960 Trilogy clearly indicated that the lower courts in the earlier proceeding between the parties had applied an incorrect rule of law.

These speculative possibilities obviously leave *American Oil* in an enigmatic position in the stream of Supreme Court cases bearing on arbitrability questions. The "elucidating process" of further litigation at the Supreme Court level will be necessary to clarify the current thinking of the members of the Court, particularly since shortly after the per curiam decision in *American Oil*, certiorari was denied in a subcontracting case which the Second Circuit, relying on the 1960 Trilogy, had decided in favor of arbitrability.[74] Petitioners had argued that a conflict existed between decisions of the Second and Seventh Circuits. It should be noted, however, that the contract provisions involved in the case for which certiorari was sought again were different from those in *American Oil*, so it is conceivable that a majority of the Court rejected the claim of con-

73. The principal ground of decision appeared to be a square rejection of the Union's claim that § 10A1 made the grievance arbitrable. The basis of the claim of alleged contract violation was evidently the doctrine of implied limitations arising out of provisions such as the recognition clause. The court rejected this approach; in so doing it obviously passed on the merits of the Union's contractual theory. Thus it seems clear to us that its actions were inconsistent with the requirements of the 1960 Trilogy. But the decision may be explainable, in part, as resting on § 10D of the contract. The court said defendant's position on this provision excluding subcontracting from the arbitration had "plausibility," but it saw no need to resolve the question posed. However, it added: "The section is significant because the parties agreed that certain disputes were not subject to compulsory arbitration, which destroys plaintiff's theory that the mere allegation of contract violation requires arbitration." 324 F.2d 902, 907.

74. International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485 (2d Cir.), *cert. denied*, 377 U.S. 908 (1964).

flict. But another possibility is that the Court is standing by the 1960 Trilogy and that the vote in *American Oil* is not to be interpreted otherwise. Until the contrary is shown, we see no reason to modify our views as expressed above concerning the meaning of the 1960 cases, although, as we shall note, there is room for the view that the Court will not relegate to arbitrators the final interpretation of those arbitration clauses the Court deems to be clearly restrictive or even ambiguous.

E. *The Kimball Company Case*

Piano & Musical Instrument Workers Union v. W. W. Kimball Co. was another per curiam decision rendered in December 1964, again with respect to a Seventh Circuit decision. But this time a different kind of substantive issue was involved. A labor agreement between Kimball Company and the Union covered operations at the Company's Melrose Park, Illinois, plant. During its term, the Company notified the Union that it was discontinuing operations at Melrose Park "immediately." Two days later operations there were discontinued and employees were laid off. Thereafter, operations were transferred to a plant at French Lick, Indiana, and hiring began at that plant eight days after the Melrose Park agreement expired. The Union insisted that laid-off employees had seniority rights of recall exercisable at the French Lick plant by virtue of the Melrose Park agreement. It relied particularly on the portion of the agreement granting recall rights for a period of two years following a layoff. After extended discussions between Company and Union representatives, during which the Company offered to grant severance pay to the laid-off employees and evidently indicated its willingness to employ those who were willing to submit applications for employment at French Lick (both rejected by the Union as inconsistent with employees' total rights under the expired agreement), the Union proposed arbitration. When the Company refused, the Union brought suit to compel arbitration under a broad, standard type arbitration clause contained in the expired agreement. The Company's defense on the ground that the agreement had expired was rejected by the district court, which ruled that the question of arbitrability was for the arbitrator. The Court relied principally upon the Supreme Court's decision in *Wiley*. A reversal by the court of appeals on the ground that *Wiley* was distinguishable and not determinative was in turn unanimously reversed by the

Supreme Court, which merely cited *American Manufacturing* and *Wiley*.

This decision is of little value in our attempt to interpret the developing federal law of arbitrability, since the two cases cited involved significantly different kinds of issues. Had the Court cited *Enterprise* along with *American Manufacturing*, this would have indicated the Court considered that a claim of contract violation had been made by the Union and that such claim was for the arbitrator even though the agreement had expired since an issue of interpretation was involved. The citation of *Wiley* is confusing because the basic arbitrability issue there involved (the question whether rights under a labor agreement survived a corporate merger) was, in fact, decided by the Court itself.

IV. Issues Involving Arbitral Jurisdiction or Authority: A Categorization

It remains now to attempt to assess broadly the significance of the Supreme Court decisions reviewed above in delineating the respective roles of the judges and arbitrators and in determining the applicable federal rule of law where questions of arbitral jurisdiction or authority are raised before a court or arbitrator either before or after[75] arbitration. It will aid analysis to attempt to classify such questions, since we believe the decisions indicate that the result in a given case may depend upon the category into which it falls. Without purporting to cover all the kinds of claims of lack of arbitral jurisdiction or authority which can be made, we suggest they include at least the following:

Claim (1). There exists no contractually binding or enforceable agreement to arbitrate any issue.

Claim (2): Some provision of the labor agreement specifically excludes the subject matter of the grievance from the arbitration process.

Claim (3). The subject matter of the grievance has been excluded from the arbitration process by virtue of some special (collateral) agreement, express or implied (*e.g.*, from collective bargaining history or past practice).

Claim (4). The subject matter of the grievance is excluded from the arbitration process by virtue of certain general contractual

75. A party losing in an arbitration proceeding may obtain judicial review either by petitioning the court to vacate the arbitrator's award, if a statute provides for this procedure, or by refusing to comply with the award and then defending an enforcement action brought by the winning party.

restrictions upon the jurisdiction of the arbitrator (*e.g.*, a provision that there shall be no jurisdiction of a grievance resting on an alleged past practice or on an alleged implied obligation).

Claim (*5*). The subject matter of the grievance is not arbitrable because the labor agreement contains no substantive commitment whatsover, express or implied, of the kind which must be found to exist in order to sustain the grievance.

Claim (*6*). The subject matter of the grievance is not arbitrable because the parties have recognized in the labor agreement or by virtue of some special (collateral) agreement express or implied (*e.g.*, from collective bargaining history or past practice) the right of the respondent party to perform the act complained of.

Claim (*7*). The arbitrator lacks jurisdiction because of the failure of the grievant to comply with a requirement of the grievance or arbitration procedure.

Claim (*8*). The arbitrator lacks jurisdiction to render a valid award because of the absence from the proceeding (and the lack of power in the arbitrator to require the participation of, or to bind) a person, including another union, not party to the labor agreement under which the arbitrator is appointed, but whose interests are involved.

Claim (*9*). The arbitrator lacks jurisdiction to render a valid award because of the refusal of the other contracting party to participate in the proceeding.

Claim (*10*). The arbitrator lacks jurisdiction to render a valid award because of the absence from the proceeding of an employee subject to the labor agreement whose interests are adverse to the position taken by the grievant.

Claim (*11*). The arbitrator lacks jurisdiction of the grievance because the subject matter falls within the province of some other tribunal (*e.g.*, the National Labor Relations Board).

Claim (*12*). The award is totally or partially invalid because the arbitrator, although he had jurisdiction of the subject matter of the grievance, exceeded some contractual or legal limitations on his authority.

The question is to what extent any of these kinds of attacks on arbitral jurisdiction or authority can or should be successful as a matter of federal law. On some of these issues the Supreme Court has provided fairly clear answers. As to some others, although the Court has not directly spoken, the decisions which have been handed down and their underlying rationale provide bases for drawing plausible conclusions. As to still other issues, the answers remain largely conjectural.

Before proceeding to an analysis of the kinds of issues listed, it

is worth recalling that in a strict sense, as the Court has repeatedly stated, the existence and scope of an alleged agreement to arbitrate, if not specifically submitted for arbitral decision, are matters for judicial determination if appropriately raised before a court. In theory, then, any of the listed categories which raise an issue of this kind are "for the court." One problem, however, arises out of the fact that, while any of these kinds of claims is justiciable as a matter of theory, the Court has clearly indicated that some, at least, should not be the basis for intercepting the arbitration process, or, in our view of the cases, for invalidating an award; thus, the practical effect is that such claims are not jurisdictional. It is important to determine which categories of claims fall in this area. Another problem arises out of the fact that some of the kinds of claims listed above do not involve the question of the existence or scope of the agreement to arbitrate, but raise other questions of arbitral jurisdiction or authority.

Consequently, the categories listed above may in turn be regrouped as follows: (A) those going to questions of arbitral jurisdiction over the subject matter of the grievance or over the particular grievance [claims (1) to (7), inclusive, and claim (11)]; (B) those questions of jurisdiction involving the absence of an affected person [claims (8) to (10), inclusive]; (C) those raising the question whether the arbitral award is defective or unenforceable because of contractual or legal limitations on the arbitrator's authority [claim (12)]. We shall use this regrouping in the analysis that follows.

A. *Issues Involving Question of Arbitral Jurisdiction Over the Subject Matter or Over the Particular Grievance*

1. *Issue Clearly for Judicial Determination—Claim (1)*

We think only claim (1) of those listed above may be included with assurance under this caption. Here arbitral jurisdiction is challenged on the ground that there exists between the parties no contractually binding or enforceable agreement to arbitrate any issue (and it is assumed there has been no specific grant to the arbitrator of the authority to resolve the question of the existence of such agreement). Encompassed are a variety of contractual issues, including the assertions: (a) that the labor agreement (or, indeed, the special submission, if there was one) lacked contractual validity at its inception;[76] (b) that the labor or submission agreement, al-

76. See, *e.g.*, Genesco, Inc. v. Joint Council 13, United Shoe Workers, 230 F.

though once valid and existing, has expired;[77] (c) that the arbitration obligation contained in the agreement is unenforceable, as a matter of law, because of a breach of obligation (typically the no-strike clause) by the party seeking to arbitrate;[78] and (d) that the agreement was made by a predecessor in interest and is not binding upon the successor, who is opposing arbitration.[79]

In *Wiley*, one question raised was whether the arbitral and other commitments made in a labor agreement survived a corporate merger. The decision was categorical: "Both parties urge that this question is for the courts. Past cases leave no doubt that this is correct."[80] Cited in support of this statement were *Sinclair II* and *Warrior & Gulf*. It seems clear that the Court properly invoked the basic postulate of *Warrior & Gulf* and other cases, remarking: "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collec-

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Supp. 923 (S.D.N.Y. 1964) (condition precedent to contract formation held not fulfilled); *In re* Davis, 57 L.R.R.M. 2142 (N.Y. Sup. Ct. 1964) (authority to execute contract held lacking); Litzenberger v. Remington Rand, 53 L.R.R.M. 2052 (N.Y. Sup. Ct. 1963) (informal memoranda held not to have contractual force); *cf.* Schoenholtz v. Benley Lingerie, Inc., 49 CCH Lab. Cas. ¶ 51114 (N.Y. Sup. Ct. 1964) (failure to sign agreement held waived by participating in arbitration). See also Restaurant Leagues v. Townsend, 57 L.R.R.M. 2135 (N.Y. Sup. Ct. 1964), in which the question presented was whether an arbitration agreement between a union and an employers' association was binding upon a member of the association.

77. See, *e.g.*, Minnesota Joint Bd., Amalgamated Clothing Workers v. United Garment Mfg. Co., 338 F.2d 195 (8th Cir. 1964) (arbitration clause enforced after contract expired for breach occurring during its term); Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1962) (grievances based upon conditions arising after contract has expired held not arbitrable); Worcester Stamped Metal Co. v. United Steelworkers, 234 F. Supp. 823 (D. Mass. 1964) (grievance involving vacation pay held arbitrable although contract had expired when grievance arose); Austin Mailers Union v. Newspapers, Inc., 226 F. Supp. 600 (W.D. Tex. 1963), *aff'd*, 329 F.2d 312 (5th Cir. 1964), *cert. dismissed*, 377 U.S. 985 (1964) (dispute on wage scales held not arbitrable under contract which had expired before union demand arbitration).

78. See, *e.g.*, Amalgamated Clothing Workers v. United Garment Mfg. Co., 338 F.2d 195 (8th Cir. 1964); Brotherhood of Locomotive Firemen v. Kennecott Copper Corp., 338 F.2d 224 (10th Cir. 1964); United Mine Workers v. Roncco, 232 F. Supp. 865 (D. Wyo. 1964); Amalgamated Ass'n of St. Employees v. Trailways of New England, Inc., 232 F. Supp. 608 (D. Mass. 1964).

79. For two recent cases which relied upon *Wiley* in concluding that a successor employer must arbitrate grievances arising under a prior contract, see United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964), and Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964). In the former case, the court seems to limit the possible scope of arbitration by stating that "in the arbitration of any grievance asserted thereunder, the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable." 335 F.2d 891, 895.

80. 376 U.S. 543, 546 (1964).

tive bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so, *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."[81]

Wiley was very different from *Warrior & Gulf*, we submit, despite the Court's apparent equation of the two. While no person can be *compelled* to arbitrate except by judicial decree, the 1960 Trilogy instructed the courts to refrain from interrupting the arbitration process in cases such as those decided, and, in effect, determined that arbitrability issues of the kinds there raised, as well as the issues going to the merits, should be resolved by the arbitrator. In *Wiley*, on the other hand, the Court took the position that a challenge to the contractual validity or applicability of an alleged obligation to arbitrate is to be independently determined by the court when raised in a judicial proceeding. In *Drake Bakeries* (of the 1962 Trilogy) and *Needham* (of the 1964 cases) we think the same position was taken with respect to the question of whether breach of an obligation by one party to a labor agreement has the legal effect of suspending the obligation of the other party to arbitrate.

2. *Issues Clearly for Arbitral Determination Under a Standard Arbitration Clause—Claims (5) and (6)*

We include under this caption those types of claims which, as we understand the Supreme Court's position, should not be held to justify judicial interception of the arbitration process for want of alleged jurisdiction in the arbitrator and which, if decided *either way* by the arbitrator, should not be a basis for refusing to enforce the arbitral decision. By "standard arbitration clause" we mean a provision that any dispute "involving the interpretation or application of this agreement," processed as a grievance under the agreement, may be submitted to arbitration under specified procedures. Under this caption we would include claims (5) and (6).

These claims essentially constitute challenges to jurisdiction on the ground that the labor agreement contains no substantive commitment of a kind that must exist in order for the claim to be sustained or that there is evidence that the parties have agreed that the charged party has the contractual right to perform the disputed act. Where, as in claim (5), the assertion is that the labor agreement,

81. *Id.* at 547.

properly interpreted, contains no express or implied commitment of the kind which must be found in order to sustain the grievance, we have the traditional challenge to arbitral jurisdiction on the basis of which the *Cutler-Hammer* and like judicial approaches were developed prior to the 1960 Trilogy. It is the teaching of the Trilogy that, so far as federal law is concerned, a court must in this kind of case allow the matter to proceed through the arbitration process[82] and must thereafter uphold the arbitrator's determination, since intertwined with the so-called jurisdictional issue is necessarily an examination of the merits of the grievance under the labor agreement itself. In *American Manufacturing*, the case most directly in point, the Court stated:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware."[83]

This is a very broad statement, indeed. We take it to mean that however generalized, absurd, ridiculous, or preposterous the grievance may appear to be, the issues of arbitrability and merits are to go to arbitration and the arbitrator may make a final determination of such issues.[84] Certainly it is clear that he may dispose of the

82. See, *e.g.*, Local 702, Int'l Bhd. of Elec. Workers v. Central Ill. Pub. Serv. Co., 324 F.2d 920 (7th Cir. 1963) (discontinuance of employee gas discount held arbitrable, although subject not included in contract); Newspaper Guild v. Tonawanda Publishing Corp., 20 App. Div. 2d 211, 245 N.Y.S.2d 832, *aff'd*, 14 N.Y.2d 631, 249 N.Y.S.2d 178 (1964) (elimination of Christmas bonus held arbitrable, although subject not included in contract). *But see* Local 30, Philadelphia Leather Workers v. Hyman Brodsky & Son Corp., 49 CCH Lab. Cas. ¶ 18987 (E.D. Pa. 1964) (closing of plant and union claim for severance pay held not arbitrable under standard arbitration clause where there was no provision in the contract covering such matters); Sperry Gyroscope Co. v. Local 450, Int'l Union of Elec. Workers, 49 CCH Lab. Cas. ¶ 51076 (N.Y. Sup. Ct. 1964) (subcontracting grievance held not arbitrable since the agreement was silent on the subject and negotiations indicated no limitation on company's right to subcontract).

83. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).

84. See, *e.g.*, Humble Oil & Ref. Co. v. Independent Industrial Workers, 337 F.2d 321 (5th Cir. 1964) (refusal of the company to allow union representatives to be present during interrogation of an employee held arbitrable where the grievance was based on certification and union recognition clauses). In International Union of Elec. Workers v. Westinghouse Elec. Corp., 228 F. Supp. 922, 924 (S.D.N.Y. 1964), the court disposed summarily of the possibility that the grievance presented might be frivolous: "In every instance the union has asserted that the acts giving rise to the grievance constituted a violation of a contract provision. In some instances this complaint seems far-fetched. But whether a violation exists is a question for the

merits; and presumably in a case such as this he will deny the grievance. But, if he sustained the grievance, there would not be reversible error. The only substantial question is whether he has the authority to hold the grievance non-arbitrable and on this ground to refuse to decide the merits. As previously stated, we think a proper interpretation of the 1960 Trilogy is that he has this right.[85] What the Court was saying, in essence, is that the entire range of issues presented is for the arbitrator to decide. It seems clear, moreover, that the range of arbitrable issues includes those cases, which are legion, where the grievance expressly or otherwise is posited upon some obligation alleged to be implicit in some part or the whole of the labor agreement.

Claim (6) is not quite so easy to dispose of as claim (5). Here the assertion is that the parties by virtue of past practice or agreement, express or implicit, have recognized the right of the party opposing arbitration to perform the disputed act.[86] An illustrative case would be one in which the grievance protests the subcontracting of work where the management rights clause of the labor agreement specifically states: "Management shall have the right to contract out work of kinds falling within the scope of the collective bargaining unit."[87]

When each of us first separately reviewed the 1960 Trilogy, we asserted that this situation should be equated to the case in which the arbitration clause specifically excludes a given subject matter (here subcontracting) from the arbitration process.[88] But we now consider this to be an improper interpretation of the cases. The fact

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arbitrator, not for the court. The fact that a claim of violation may seem to the court to be frivolous is not a ground for denying the arbitration to which the parties have agreed."

85. See Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883, 888 (1962), in which the author states: "If the court finds that the issue is *not unarbitrable*, then it should go before an arbitrator. After the arbitrator has read the contract, he may still dismiss the grievance as not arbitrable. An arbitrator must always pass on arbitrability, when he is asked to do so." See generally Jones, *supra* note 60, at 1002; Smith, *Arbitrators and Arbitrability*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 75, 90 (1963). For an application of this principle in an arbitral decision, see Hughes Tool Co., 36 Lab. Arb. 1125, 1129 (Aaron 1960).

86. See note 92 *infra*.

87. Compare the management prerogative provision in Boeing Co. v. UAW, 234 F. Supp. 404 (E.D. Pa. 1964), which states: "The Company has the right to subcontract and designate the work to be performed by the Company and the places where it is to be performed, which right shall not be subject to arbitration." Designation of the functions of management in conjunction with exclusionary language in the arbitration clause was held sufficient to preclude arbitration of a plant location dispute.

88. Jones, *The Supreme Court and the Arbitration Process*, in ADDRESSES ON INDUSTRIAL RELATIONS 121-33 (1961); Smith, *The Question of Arbitrability—The Roles of the Arbitrator, the Court, and the Parties*, 16 Sw. L.J. 1, 10 (1962).

is that the illustrative case, and others like it, are simply instances in which the grievance presents an obviously, or apparently obviously, frivolous claim. Accordingly, we can now see no reason to distinguish this case from claim (5).[89] Both are simply cases in which the decision of a court or arbitrator is easily anticipated. The Supreme Court has said, in effect, that in such instances the parties have elected to use the arbitration process and should be held to their choice. These cases like those involving subjects specifically excluded by the agreement from the arbitration process. Rather, like others apparently more meritorious, they fall within the scope of the agreement to arbitrate.

The fallacy, as we now see it, of the earlier equation of claim (6) with claim (2) lay in the assumption, not sufficiently articulated or defended, that a clear affirmance in the labor agreement of the right to perform the questioned act ought to be regarded as indicating an intent to exclude the subject matter from the arbitration process. But this begs the question. A dismissal of a grievance for lack of arbitral jurisdiction does not have the same legal effect as a denial of the grievance on the merits. A ruling against jurisdiction implies no judgment at all on the merits; but a ruling denying the grievance on the merits is a holding either that the adverse party has not contractually committed himself in any way with respect to the subject matter of the grievance or, as in a claim (6) situation, that the party has a positive contractual right to perform the disputed act. The latter is a binding interpretation of the labor agreement, with whatever consequences are entailed.

This distinction may in some cases be important. For example, it may determine whether the moving party (grievant) has or lacks

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89. Two cases recently considered whether a management functions clause should be held to exclude a dispute from arbitration. In Local 12298, Dist. 50, UMW v. Bridgeport Gas Co., 328 F.2d 381 (2d Cir. 1964), *reversing* 222 F. Supp. 297 (D. Conn. 1963), a management functions clause providing that "the right to relieve employees from duty because of lack of work is vested in the Company" was held not to preclude arbitration of disputes concerning the existence of job vacancies. The court ruled that the posting of vacancies was held to be encompassed within the term "conditions of employment" and not unambiguously excluded from arbitration. A similar conclusion was reached in General Warehousemen Union v. American Hardware Supply Co., 329 F.2d 789 (3d Cir. 1964). Notwithstanding a provision for severance pay "when, in the sole judgment of the Company, it decides to discontinue operation of any portion of its wholesale house," the court held that the union was entitled to arbitrate employee terminations upon movement of facilities. In accordance with the 1960 *Trilogy*, the court refused "to succumb to the enticing temptation to determine at the outset whether the asserted controversy is palpably unfounded on its merits." *Id.* at 792.

a right to seek relief with respect to the protested act either by self-help, such as strike action, or before a court.[90]

3. Issues in Doubt—Claims (2), (3), (4), (7), and (11)

Although the Supreme Court has not as yet spoken definitively on these issues, or at least all aspects of them, certain decisions afford some guidance. The views here expressed represent our tentative judgments.

a. *Claims (2) and (3).* Claims (2) and (3) may be grouped together since in each instance the contention is that the subject matter of the grievance has been excluded from the arbitration process by agreement. The difference between the two is that in claim (2) it is asserted that some specific provision in the labor agreement indicates this exclusionary intent,[91] whereas in claim (3) the argument is that such intent is to be found in a special agreement or in the implications of past practice or collective bargaining history.[92]

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90. Allied Workers Union v. Ethyl Corp., 58 L.R.R.M. 2267 (5th Cir. 1965).

91. For example, the court in Communication Workers v. New York Tel. Co., 327 F.2d 94 (2d Cir. 1964), considered the following contractual provision dealing with promotions: "In selecting employees for promotion to occupational classifications within the bargaining unit, seniority shall govern if other necessary qualifications are substantially equal. In no event shall any grievance or dispute arising out of this Section 9.08 be subject to the arbitration provisions of this Agreement." Denying the arbitrability of grievances involving temporary promotions, the court observed, "It is difficult to imagine a clearer or more direct exclusionary clause. . . . We believe these words convey a clear and unambiguous directive that no Section 9.08 disputes of any kind are arbitrable."

92. One type of exclusion by special agreement is illustrated by Boot Workers v. Faith Shoe Co., 47 CCH Lab. Cas. ¶ 18260 (M.D. Pa. 1963). In this case, subsequent to the initial contract, the parties had entered into an agreement excluding a subject from arbitration. The court held that both agreements must be considered to determine the arbitrability of a claim.

A more commonly encountered claim of exclusion rests on the alleged existence of collective bargaining history of nonarbitrability of a particular type grievance. To indicate the intent of the parties, bargaining history may be presented either under claim (3) to prove that the subject was excluded from arbitration or under claim (6) to prove that one party (usually the employer) had a right to perform the act charged as breach of the contract. It is often difficult to separate these two issues in a particular case, since both are common arguments presented in subcontracting and other "management prerogative" cases. Under either claim there has been a conflict of authority on the propriety of using bargaining history to defeat arbitrability. Courts appear to be more willing to accept evidence of bargaining history to exclude a subject from arbitration than to deny arbitration where the right to perform an act is claimed as a bar. The following cases have ruled upon the question. Under claim (3): Decisions holding bargaining history admissible: Communications Workers v. Pacific Northwest Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964), *affirming* 310 F.2d 244 (9th Cir. 1962); Independent Soap Workers v. Procter & Gamble Mfg. Co., 314 F.2d 38 (9th Cir. 1963), *cert. denied*, 374 U.S. 807 (1963); United Brick Workers v. A. P. Green Fire Brick Co., 232 F. Supp. 223 (E.D. Mo. 1964); United

With respect at least to claim (2), it could be argued that the question of arbitrability is simply one of interpretation of part of the arbitration clause, and hence, like any other question of interpretation arising under the labor agreement, should be disposed of by judicial abstinence and referral to the arbitration process. Since, however, we are dealing here with the interpretation of the arbitral jurisdiction language of the agreement, it can more plausibly be argued that this approach should be rejected and that an issue of this kind is for a court to decide independently if it is raised in a judicial proceeding.

Our analysis of the 1960 Trilogy cases led us to conclude that one of the propositions emerging from the decisions was that a court should hold a grievance non-arbitrable under a valid agreement to use arbitration as the terminal point in the grievance procedure only if the parties have clearly indicated their intention to exclude the subject matter of the claim from the arbitration process, either by expressly so stating in the arbitration clause or by otherwise clearly and unambiguously indicating such intention. Our analysis of the 1962 cases noted that the Court in *Sinclair II* independently decided that the grievance there involved (the claim that the union had breached its no-strike covenant) was clearly excluded from the arbitration process. Thus it may be concluded that the controlling question for the Court is whether the particular labor agreement or some alleged special agreement does *clearly* exclude the subject matter or the grievance from the arbitration process. If the Court has any doubt, it seems likely that the matter would be sent to arbitration. But *Sinclair II* shows that the Court can be convinced, in a given case, that there is no doubt.

Questions of interpretation of exclusionary language contained in an arbitration clause or some other provision of a labor agreement

Elec. Workers v. General Elec. Co., 208 F. Supp. 870 (S.D.N.Y. 1962); Maryland Tel. Union v. Chesapeake & Potomac Tel. Co., 187 F. Supp. 101 (D. Md. 1960). Decisions holding bargaining history inadmissible: A. S. Abell Co. v. Baltimore Typographical Union, 338 F.2d 190 (4th Cir. 1964); International Union of Elec. Workers v. Westinghouse Elec. Corp., 228 F. Supp. 922 (S.D.N.Y. 1964). Under Claim (6): Decision holding bargaining history admissible: Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1964), *aff'd per curiam by an equally divided court*, 379 U.S. 130 (1964). Decisions holding bargaining history inadmissible: International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485 (2d Cir. 1964); Ass'n of Westinghouse Salaried Employees v. Westinghouse Co., 283 F.2d 93 (3d Cir. 1960); Newspaper Guild v. Hammond Publishing Co., 48 L.R.R.M. 2577 (N.D. Ind. 1961); Emmett O'Malley v. Wilshire Oil Co., 59 Cal. 2d 482, 381 P.2d 188 (1963). A related case, NLRB v. Gulf Atl. Warehouse Co., 291 F.2d 475 (5th Cir. 1961), held that bargaining history should be excluded in determining whether a union could require an employer to furnish seniority lists.

will not always be easy for the Court. Moreover, in some cases the intent and scope of the exclusionary language arguably may call for the kind of expertise which, in the 1960 Trilogy cases, the Court attributed to the arbitrator.[93] It is conceivable, and in our judgment likely, that in any such case the Court, reverting to the rationale underlying the 1960 decisions, will view the matter as involving to some extent the basic merits of the grievance and therefore will refer it to the arbitrator for decision.[94] On the other hand, if the

93. In one case with which we are familiar the arbitration clause provided that "the arbitrator may act only on violations of the terms of this Agreement, and cannot determine wages, production standards, or job classifications." A piecework wage system was in effect in the plant, and the agreement contained certain provisions relating to the system, including the following: "Production standards shall be established on the basis of fairness and equity consistent with the quality of workmanship, efficiency of operation, and the reasonable working capacities of normal operators." The grievance filed by the Union asserted that the Company had violated the wage provisions of the agreement by requiring a piecework operator to rerun on his own time (*i.e.*, without additional compensation) salvageable pieces which he had run defectively and in charging back against the operator non-salvageable pieces which he had run defectively. The Union, moreover, asserted that the grievance was not arbitrable and, hence, that it had to be settled through collective bargaining. The agreement made strike action available in the case of non-arbitrable grievances. The question of arbitrability was whether the determination of a production standard was involved; the Company contended no such question was involved, but rather, only an application of a long-standing practice. The parties were in agreement, despite the provision above-quoted, that the fairness of a production standard was not arbitrable (a fact, in itself, somewhat difficult to understand). We submit that in a case like this a determination of the arbitrability question is difficult, indeed, and probably requires, among other things, an intensive examination of the alleged past practice and an understanding of the precise nature and operation of the incentive system being used.

Occasionally the exclusionary provision of the agreement is unique and presents unusual and even more difficult problems of analysis and interpretation. For example, in another case with which we are familiar the arbitration clause, instead of using exclusionary language, stated categories of cases *subject* to arbitral determination, including the following: "(b) the dismissal (except for misconduct) of an employee who at the time of dismissal had three (3) or more years of completed net credited service." In one discharge case which the Union sought to arbitrate, the question of arbitral jurisdiction was presented and sharply contested. The Company conceded that employee dismissals for certain kinds of derelictions (*e.g.*, insubordination, inadequate work performance, and drinking on the job) were not excluded from arbitral review, but contended that a dismissal for any kind of dereliction comprehended by the term "misconduct" not only was not arbitral, but that all the Company had to show in order to make the matter non-arbitrable was that the dismissal was motivated by the good faith belief that the employee had committed the act of misconduct charged, proof of the actual commission of such act not being required. The parties did agree, however, that at least the meaning of the term "misconduct" was arbitral. Again, we submit, the kinds of issues here involved lend themselves peculiarly to the arbitration process.

94. See, *e.g.*, Publishers' Ass'n v. New York Mailers' Union, 317 F.2d 624, 625 (2d Cir. 1963). In Desert Coca-Cola Bottling Co. v. General Sales Drivers Union, 335 F.2d 198 (9th Cir. 1964), the arbitration provision concluded with the statement: "It is understood that the above shall not apply in any way concerning wages." Notwithstanding this provision, the court held arbitrable a question of whether driver-salesmen were entitled to overtime compensation for work in excess of forty hours per week.

exclusionary provision seems perfectly clear to the Court despite any argument to the contrary, it will probably make its own independent determination of the question of arbitrability.[95]

b. *Claim (4).* Claim (4) is that the subject matter is excluded from the arbitration process by virtue of certain general contractual restrictions upon the jurisdiction of the arbitrator. We include in this category any claim of non-arbitrability which relies on a theory other than that the subject matter is specifically excluded from the arbitration process by the labor agreement itself or by some special agreement, express or implied. Without necessarily attempting a complete enumeration, we suggest that this category includes the following types of cases:

(A). Under the arbitration clause of the labor agreement the arbitrator's jurisdiction is specifically limited to grievances the subject matter of which is dealt with expressly by the labor agreement. Illustratively the agreement might state: "In order for a grievance to be arbitrable, it must involve and allege violation of a provision of this agreement which specifically and expressly deals with the subject matter of the grievance."[96]

The court reasoned that wages need not be interpreted as commensurate with compensation, but that it could be given a narrower definition commensurate with "wage scale." Thus, since the arbitration clause might be "susceptible of an interpretation that covers the asserted dispute," arbitration was directed.

95. See Communications Workers v. New York Tel. Co., 327 F.2d 94, 97 (2d Cir. 1964), where the court reviewed the federal policy favoring arbitration and concluded: "[I]f the strong presumption in favor of arbitrability established in the Steelworkers cases is not to be made irrebuttable, we cannot close our eyes to the plain meaning of the words used in this contract. . . . We cannot bring ourselves to accept this invitation to ignore the plain meaning of the . . . exclusionary clause, and to find ambiguity where none exists, by indulging ourselves in speculation as to what types of disputes a union might be likely to require an employer to settle by arbitration." Likewise, the court in Local 787, Int'l Union of Elec. Workers v. Collins Radio Co., 317 F.2d 214, 219 (5th Cir. 1963), commented: "The exclusionary terms used in the contract were emphatic. . . . While the Union had contrived a beguiling theory to make this appear to be something other than what it really is, the effect is to allow arbitration of a dispute categorically excluded. . . . The parties by the plainest language excluded this controversy and all of those growing out of it from the grievance machinery. This Court, following the admonitions of the Supreme Court's Trilogy opinions, recognizes that the law is committed now to a hospitable application of the grievance machinery prescribed by parties to a collective bargaining contract. . . . But if full rein is to be given to this device as a means thought best able to achieve industrial peace, it must be enforced with an even hand. That which the parties have committed to the arbiter is for the arbiter alone, not the Court. Courts must assure that. But it is equally important to assure that neither party—through one guise or another—may obtain the intervention of an arbiter when the contract clearly excludes it from the reach of the grievance machinery."

96. See, *e.g.*, Boeing Co. v. UAW, 231 F Supp. 930 (E.D. Pa. 1964), which involved a provision limiting arbitration to grievances involving a "specific provision of this agreement." The court held that the employer was not obligated to arbitrate a dispute concerning its distribution of Christmas turkeys which was not referred to in the agreement.

(B). The arbitration clause in the labor agreement may or may not be limited as in (A) above, but, in addition or independently, it excludes from arbitration any grievance which, in order to be sustained, must rest upon some contractual obligation implied from some provision or provisions of the labor agreement or must rest upon the alleged binding effect of some alleged past practice or agreement not expressed in or part of the labor agreement.

(C). The labor agreement contains a "management rights" clause, either in general or specific terms, and provides either (1) that "all management rights other than those qualified or surrendered by some specific provision of this agreement are not subject to arbitration hereunder," or (2) that "the exercise by the Company of any of its exclusive rights shall not be subject to arbitration except with respect to a claim that such right was exercised in bad faith."[97]

(D). The arbitration clause in the labor agreement provides that, if in response to a demand to arbitrate a grievance it is contended that the subject matter of the grievance is not arbitrable, the arbitrator shall be without jurisdiction to proceed with the grievance unless (1) the parties specifically stipulate that he may decide the arbitrability issue, or (2) the grievance is determined to be arbitrable by a court of competent jurisdiction.

Taking the easiest case first, it is clear that in the last of the cited examples the question of arbitrability obviously would be for the court in the absence of a special submission to the arbitrator, since, however foolishly, the parties have clearly and unambiguously given the party opposing arbitration the right to insist upon an *ad hoc* judicial determination of the arbitrability issue.[98] The only doubtful case, as we see it, might be one in which the court could be convinced that the respondent has interposed the arbitrability issue in bad faith—*i.e.*, where the objection to arbitrability is clearly spurious.

The other types of examples—(A), (B), and (C) above—seem to us to require a different analysis. The critical question is whether these kinds of contractual attempts to restrict the arbitrator's jurisdiction should be equated with cases where the parties by

97. Although not directly in point, see Truck Drivers v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964).

98. It is obvious, of course, that the court would be obliged to apply the applicable federal law in resolving the arbitrability question. Thus, if the arbitration clause of the agreement is in other respects standard (*i.e.*, making arbitrable questions of "interpretation or application of the agreement"), the court would be obliged to rule in favor of arbitrability if the grievance asserts that some provision or provisions of the labor agreement have been violated, and the subject matter of the grievance is not clearly excluded from the arbitration process.

agreement have specifically excluded certain subject matters from the arbitration process or instead should be treated like those cases where the claim of non-arbitrability rests on the proposition that the labor agreement contains no express or implied substantive commitment of the kind which must be found in order to sustain the grievance. If the first of these approaches were taken, the analysis of the scope of the judicial function would logically be like that with respect to claims (2) and (3). Thus, if the Court were convinced that the parties had stated their intentions clearly and that a final determination of the grievance would require an exercise of authority specifically withdrawn from the arbitrator by the contract, it presumably would refuse to require the grievance to be submitted to arbitration. We suggest, however, that even if this analysis of the nature of the arbitrability issue were to be adopted, the Court would very likely often find reasons for holding that the restrictive provisions are not clear, or are not clearly applicable to the particular case, or are intertwined with the merits. In such cases the Court presumably would refer the matter to the arbitrator.

In our view, most of these types of ostensible contractual restrictions upon the jurisdiction of the arbitrator are simply different ways of structuring the labor agreement in an attempt to preclude a finding that there is a contractual commitment of the kind which must be found to exist in order to sustain the grievance. Thus analyzed, the underlying question really involves the merits and should be relegated to the arbitration process. If the agreement contains a broad, unqualified no-strike provision, this analysis is especially persuasive. With respect to matters that are made litigable or which may justify a strike, however, the Court might be willing to take more seriously these kinds of attempted limitations of arbitrable jurisdiction.

c. *Claim (7)*. Claim (7) presents the procedural arbitrability problem. Our discussion of the *Wiley* case indicates why, despite the decision and the broad language used in the opinion, we think the question whether such an issue is for the court or for the arbitrator remains in doubt. We noted that the Court was confronted with facts that made it plausible to state that "questions concerning the procedural prerequisites to arbitration do not arise in a vacuum," but "develop in the context of an actual dispute about the rights of the parties to the contract,"[99] and that "doubt whether grievance procedures or some part of them apply to a particular

99. 376 U.S. 543, 556-57.

dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration."[100] These observations were appropriate in the light of the basic arbitrability issue presented—whether the labor agreement survived a corporate merger and bound the successor corporation.[101]

Such observations would not be as appropriate in the more usual case in which it is urged that alleged procedural deficiencies bar arbitration. It may be contended, therefore, that the decision in *Wiley* on the procedural issue should be regarded as limited to the particular facts of that case or to situations where the validity of the procedural objections to arbitration are otherwise intertwined with the merits or with other issues of arbitrability resolved in favor of arbitration. For example, a distinction might be drawn between the case where the agreement prescribes procedural requirements without indicating expressly the consequence of noncompliance and the case where the agreement provides expressly that a grievance improperly processed shall not be arbitrable.[102] The former could (and we think should) be viewed as part of the total case on the merits to be decided by the arbitrator.[103] The

100. *Id.* at 556.

101. The Union contended, to quote from the opinion, "that Wiley's consistent refusal to recognize the Union's representative status after the merger made it 'utterly futile'—and a little bit ridiculous to follow the grievance steps set forth in the contract," and "that time limitations in the grievance procedure are not controlling because Wiley's violations of the bargaining agreement were 'continuing.'" *Id.* at 557. The Court stated:

> "These arguments in response to Wiley's 'procedural' claim are meaningless unless set in the background of the merger and the negotiations surrounding it. . . . In this case, one's view of the Union's responses to Wiley's 'procedural' arguments depends to a large extent on how one answers questions bearing on the basic issue, the effect of the merger; *e.g.*, whether or not the merger was a possibility considered by Wiley and the Union during the negotiations of the contract." *Ibid.*

Thus, there were in this case somewhat unusual circumstances surrounding the procedural issues, and forceful reasons independent of the expressed intent (or lack of it) in the labor agreement as to the effect of noncompliance with procedural requirements for holding, once the basic arbitrability issue had been decided, that the procedural issues should be referred to the arbitrator.

102. *E.g.*, who shall sign or present the grievance, what in-plant steps are to be followed, and what time limits exist on grievances? The provision in *Wiley* was of this type. See *id.* at 556 n.11.

103. The following decisions rendered subsequent to *Wiley* have left procedural questions of this type for the arbitrator: Avco Corp. v. Mitchell, 336 F.2d 289 (6th Cir. 1964) (whether grievance filed within time limits of contract); Standard Screw Co. v. UAW, 335 F.2d 103 (6th Cir. 1964) (whether grievance moot when filed); United Steelworkers v. American Int'l Aluminum Corp., 334 F.2d 147 (5th Cir. 1964) (whether conditions precedent to arbitration had been satisfied); Amalgamated Ass'n

latter, on the other hand, could (and again we think should) be regarded like other cases involving contract language specifically restricting arbitral jurisdiction; this type of case should be decided independently by the court if the language is clear and no defense against the applicability of the provision is offered.[104] If, on the other hand, the union invokes an alleged past practice of disregarding the procedural requirement in issue or some other tenable basis for holding the requirement inapplicable, an appropriate analysis would be to regard the meaning and scope of the requirement as in doubt and to refer the matter to the arbitrator for decision.[105]

d. *Claim (11).* Here the question is whether the arbitrator lacks jurisdiction because the subject matter of the grievance falls within the province of some other tribunal such as the National Labor Relations Board.[106] As noted above, we interpret *Carey* as declaring as a matter of federal law that the existence of concurrent but unexercised NLRB jurisdiction does not deprive the arbitrator of jurisdiction and that he may not properly refuse to take jurisdiction because of the existence of NLRB jurisdiction. However, *Carey* did not decide or even clearly indicate what the rule is when the Board has assumed jurisdiction.

We noted that a party having a contractual remedy as well as one before the Board arguably is entitled to pursue both. This view may be fully persuasive where the issue is not precisely the same

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of St. Employees v. Trailways of New England, Inc., 232 F. Supp. 608 (D. Mass. 1964) (whether grievance was seasonable and sufficiently specific).

104. See Kennecott Copper Co. v. Local 1081, Int'l Bhd. of Elec. Workers, 58 L.R.R.M. 2045 (10th Cir. 1964), in which the court held that a union's grievance need not be submitted to arbitration where the employer failed to answer the grievance within the contractual time limits and the contract provided that such failure amounted to a forfeiture.

105. In Local 824, United Bhd. of Carpenters v. Brunswick Corp., 227 F. Supp. 643 (W.D. Mich. 1964), a union sought to compel arbitration of a grievance filed after the time limits set forth in the collective bargaining agreement. The union alleged that special circumstances excused its failure to file the grievance on time. The employer contested arbitration, relying on a part of the contract providing that, if the union's grievance was not filed on time, it was to "be deemed settled on the basis of the Company's last answer." The court, in ordering arbitration, stated: "Whether plaintiffs have complied with the procedural requirements, or whether they are excused from such compliance by reason of the special circumstances of this case, is for the arbitrator and not for the courts."

106. See generally Beatty, *Arbitration of Unfair Labor Practice Disputes*, 14 ARB. J. (n.s.) 180 (1959); Christensen, *Arbitration, Section 301, and the National Labor Relations Act*, 37 N.Y.U.L. REV. 411 (1962); Cummings, *NLRB Jurisdiction and Labor Arbitration—"Uniformity" v. "Industrial Peace,"* 12 LAB. L.J. 425 (1961); Feinberg, *The Arbitrator's Responsibility Under the Taft-Hartley Act*, 18 ARB. J. (n.s.) 77 (1963); Wollett, *The Agreement and the National Labor Relations Act—Courts, Arbitrators and the NLRB—Who Decides What?*, 14 LAB. L.J. 1041 (1963).

under the NLRA as under the labor agreement, although having some common elements, and where the results, if different, would not place either party upon compliance in an illegal or untenable position (as where the question is whether an employee was improperly discharged because of anti-union motivation). After all, it should be recalled that in a Board proceeding the moving party is the government, so the parties are different than in arbitration, the evidence adduced may be different, and the applicable principle may be different.

On the other hand, where the issue sought to be arbitrated is precisely the same as that before the Board, or where different results would place a party in an untenable position, a strong argument can be made that the arbitrator should be entitled to decline jurisdiction and that a court should not order arbitration.[107] Illustrative would be an issue concerning the scope of the bargaining unit when the "recognition" clause of the contract defines the bargaining unit exactly as it was defined in the NLRB certification or a question whether an employee was improperly discharged for nonpayment of dues under a union shop provision conforming precisely to the requirements of section 8(a)(3) of the NLRA. A court asked to order arbitration of issues such as these which are pending before the Board, or which have been resolved by the Board, could properly be expected to invoke equitable grounds for re-

107. In the following cases the court has ordered arbitration despite the contention that the dispute involved an unfair labor practice: Humble Oil & Ref. Co. v. Independent Industrial Workers, 337 F.2d 321 (5th Cir. 1964); Lodge 12, Dist. 37, Int'l Ass'n of Machinists v. Cameron Iron Works, 257 F.2d 467 (5th Cir. 1958); Amalgamated Ass'n of St. Employees v. Trailways of New England, Inc., 232 F. Supp. 608 (D. Mass. 1964); United Steelworkers v. Westinghouse Elec. Corp., 413 Pa. 358, 196 A.2d 857 (1964). In addition, numerous courts have compelled arbitration even though unfair labor practice charges had already been filed with the NLRB. See, *e.g.*, United Steelworkers v. American Int'l Aluminum Co., 334 F.2d 147 (5th Cir. 1964); Local 702, Int'l Bhd. of Elec. Workers v. Central Ill. Pub. Serv. Co., 324 F.2d 920 (7th Cir. 1963); Local 396, Package & Util. Drivers Union v. Hearst Publishing Co., 206 F. Supp. 594 (S.D. Cal. 1962); Retail Shoe Salesmen v. Sears, Roebuck & Co., 185 F. Supp. 558 (N.D. Cal. 1960); Glass Bottle Blowers Ass'n v. Arkansas Container Co., 183 F. Supp. 829 (E.D. Ark. 1960). However, in Kentile, Inc. v. Local 457, United Rubber Workers, 228 F. Supp. 541 (E.D.N.Y. 1964), the court stayed arbitration where the trial examiner had rendered his decision. The court said:

> "To require the plaintiff to now proceed with arbitration for the purpose of determining whether it has violated the collective bargaining agreement by refusing to discharge the replacement employees who had not become members of the union would, in the light of the four day hearing before the trial examiner and his decision, be an exercise in futility. The question to be resolved by arbitration having been fully tried and decided by the trial examiner it would be repetitious to arbitrate the very same issue." *Id.* at 544.

See also Belsinger Signs, Inc. v. Local 26, Int'l Bhd. of Elec. Workers, 57 L.R.R.M. 2383 (D.C. Cir. 1964), where a preliminary injunction to enforce an arbitration award was denied since the resolution of the issues would be affected, at least in part, by an unfair labor practice case pending before the NLRB.

fusing to grant the order. By the same token we think an arbitrator should be considered to have the right, deriving either from the nature of his office under the law or by necessary or proper implication under the agreement, to decline jurisdiction.

Other kinds of questions of "dual" jurisdiction may arise. One such question lay in the background in *Carey*. There the issue to be arbitrated was whether certain work had been improperly removed from the coverage of the agreement under which the arbitration was sought. If the work had been removed pursuant to an award issued by another arbitrator functioning under the agreement with the other union claiming the work, the second arbitrator might have been asked (by the employer) to refuse to assume jurisdiction on the ground that the issue had been decided. It seems clear, however, that any such plea would have had to be denied, since the first proceeding would have involved different parties and a different agreement.

There may, of course, be situations in which, by virtue of some statute, the parties are deprived of the right to use private arbitration. Illustrative would be an attempt by agreement between a rail carrier and a union to avoid the jurisdiction of the National Railroad Adjustment Board.[108] Illustrative also might be the case where a master agreement between a multi-plant employer and an international union establishes an exclusive "umpire" procedure for resolving unsettled grievances, but some constituent local union and a local plant manager attempt to dispose of a grievance on an *ad hoc* basis before a different arbitrator. In these cases it would doubtless be held that the substituted arbitration process could not be legally effective.

B. *Issues Involving Questions of Jurisdiction Arising Out of Absence From the Proceeding of an Affected Person or Party*

1. *Absence From the Proceeding of an Affected Person or Union Not Subject to the Labor Agreement—Claim (8)*

The contention here is that the arbitrator lacks jurisdiction to make a valid award because of the absence from the proceeding (and the lack of power in the arbitrator to require participation of or to bind) a third person or union not a party to or subject to the labor agreement under which the arbitrator is appointed.[109] This issue was present in *Carey*. As we have stated, we believe the Court in effect ruled as a matter of federal law that this kind

108. See note 2 *supra*.
109. See generally Jones, *supra* notes 60 and 61.

of attack on arbitral jurisdiction lacks merit and, indeed, that the consequence is that the arbitrator lacks the right to decline jurisdiction in such a case. Of course, the Court did not decide that the arbitral award, if adverse to the interests of the non-participating union, would be binding on that union;[110] nor did it rule that the arbitrator could somehow make such an award binding by serving notice of the arbitration proceeding and affording an opportunity to appear and be heard. We think any such decision is highly improbable, to say the least.

2. *Refusal of Contracting Party To Participate in the Proceeding—Claim (9)*

The issue involved in this claim is whether, because the party opposing arbitration of a grievance refuses to appear or participate in the arbitration proceeding, the arbitrator (assuming one is somehow selected) lacks jurisdiction to proceed and to render a valid award. Although this issue has not yet reached the Supreme Court, it seems to us the question posed is so fundamentally jurisdictional and so completely independent of the merits of the claim sought to be arbitrated that the Court should classify it as one to be decided by the judiciary when the issue is appropriately raised.

The "assumption" that an arbitrator "somehow" has been selected in such a case suggests problems. If the labor agreement establishes a selection procedure which does not necessarily require the full cooperation of the other contracting party (as, for example, provision for use of the procedures of the American Arbitration Association or the Federal Mediation and Conciliation Service) and the arbitrator is selected under such procedure, we think the Court should support the jurisdiction of the arbitrator to proceed *ex parte*, since the basic consensual prerequisite to arbitration exists by virtue of the underlying agreement, and the opportunity to appear and be heard satisfies any requirement of procedural due process.[111]

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110. A New York court denied enforcement of an arbitration award against the international union where the grievance heard by the arbitrator referred solely to the local union. *In re* New York Shipping Ass'n, Inc., 54 L.R.R.M. 2680 (N.Y. Sup. Ct. 1963).

111. There are a number of recent cases in which the jurisdiction of the arbitrator to proceed *ex parte* in such circumstances has been upheld. See, *e.g.*, United Steelworkers v. Danville Foundry Corp., 52 L.R.R.M. 2583 (M.D. Pa. 1963); Amalgamated Meat Cutters v. Penobscot Poultry Co., 200 F. Supp. 879 (D. Me. 1961); Ulene v. La Vita Sportswear Co., 220 Cal. App. 2d 335, 34 Cal. Rptr. 36 (1963). See Smith, *Arbitrators and Arbitrability*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 75, 80 n.5 (1963).

On the other hand, if the only specified method of selecting an arbitrator requires agreement or cooperation of the parties, there are greater difficulties. Very likely in such a case there could be no arbitrator designated except by and through judicial intervention to enforce the agreement to arbitrate. Here, also, we think it likely that the Court would support this kind of procedure. The controlling question would be whether the agreement, properly construed, constituted an obligation to arbitrate or only an obligation to arbitrate if both parties should be willing cooperatively to do so. If, as we believe, the former is the more accurate interpretation, the equity jurisdiction of the courts should be adequate to the task of enforcing the obligation against an uncooperative party.[112]

3. *Absence From the Proceeding of Bargaining Unit Employee Subject to the Agreement Whose Interests Are Adverse to Position Taken by Union—Claim (10)*

The question raised here is whether, because of the absence from the proceeding of an employee subject to the labor agreement whose interests are adverse to the position being taken by the union in support of the grievance, the arbitrator lacks jurisdiction to render a valid award. An illustrative example is presented by almost any seniority case where the union, in deciding to process a grievance filed by a particular employee asserting a right to preferential treatment because of his seniority, has made an internal decision that the grievant's rights are superior to those of another employee. Involved is the fundamental relationship of the union, as representative of all the employees in the bargaining unit, to the individual employee in the negotiation and administration of the labor agreement.[113]

112. See *In re* Masters, Mates & Pilots, 52 L.R.R.M. 2392 (N.Y. Sup. Ct. 1963), wherein the court denied enforcement of an arbitration award where the employer refused to appoint two arbitrators as was required by the parties' collective bargaining agreement. However, the court said that the union could have met this requirement by petitioning the court either to compel arbitration or to appoint the needed arbitrators.

113. See generally Fleming, *Some Problems of Due Process and Fair Procedure in Labor Arbitration*, 13 STAN. L. REV. 235 (1961); Hanslowe, *Individual Rights to Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, 14 LAB. L.J. 1052 (1963); Lenhoff, *The Effect of Labor Arbitration Clauses Upon the Individual*, 9 ARB. J. (n.s.) 3 (1954); Rosen, *The Individual Worker in Grievance Arbitration—Still Another Look at the Problem*, 24 MD. L. REV. 233 (1964); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962); Wellington, *Union Democracy and Fair Representation—Federal Responsibility in a Federal System*, 67 YALE L.J.

In the *Hein-Werner* case,[114] the Wisconsin court held that the award of the arbitrator is invalid in this kind of case unless the employee whose interests may be adverse to the union's position has been offered the opportunity to appear and be heard in the proceeding. The basic postulate of the decision was that, as a matter of law, a union fails in its legal duty of fair representation[115] whenever, as the court put it, "the interests of two groups of employees [within the unit] are diametrically opposed to each other and the union espouses the cause of one in arbitration . . . ."[116]

The precise issue has not yet reached the Supreme Court, but in *Humphrey v. Moore*,[117] decided in 1964 (not reviewed above because not in the mainstream of decisions on the arbitration process), the Court seemed clearly to reject the premise underlying the Wisconsin court's decision. It should be noted, however, that *Moore* was a case in which the interests adversely affected by the union's position were in fact represented independently in the proceeding, and the proceeding itself, while an appellate stage of an established grievance procedure, was before a joint management-union committee rather than before an arbitrator. In any event, we think it unlikely in view of the positions taken in *Moore* and the decision in *Carey* that the Court would rule on facts like those of *Hein-Werner* that an award is rendered invalid solely because of a failure to offer employees opposed to the union's position an opportunity to appear and be heard independently. Nor do we think it likely the Court would hold such an award unenforceable if later attacked collaterally by any such employee except, possibly,

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1327 (1958); Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215 (1964).

114. Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *cert. denied*, 362 U.S. 962 (1960).

115. A union's legal duty to represent fairly all the employees in the bargaining unit has been declared in several Supreme Court decisions. See, *e.g.*, Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957); Syres v. Oil Workers, 350 U.S. 892 (1955); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

116. 8 Wis. 2d 264, 272, 99 N.W.2d 132, 137 (1959).

117. 375 U.S. 335 (1964). The Supreme Court held that a union did not violate its duty of fair representation by obtaining the decision of a joint employer-union committee to dovetail the seniority lists of two companies when one of the companies absorbed the business of the other. "By choosing to integrate seniority lists based upon length of service at either company," the Court observed, "the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors." *Id.* at 350. Of more importance to our immediate inquiry, however, was the Court's statement that it was "not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Id.* at 349.

on a factual showing that the union was guilty of bad faith in processing the grievance. Even if bad faith were in the picture, there would remain the problem whether the remedy of the adversely affected employee would be held to include a right to have the award set aside (at least in the absence of collusion between employer and union).

This is admittedly a difficult area, and Professor Summers, among others, has sought to develop a construct of individual rights which, if accepted by the Court, would distinctly qualify the union's representational authority.[118] Certainly it must be clear in any case that the kinds of problems here involved are matters of substantive law to be resolved finally by courts, not arbitrators.

C. *Issues Involving Question Whether Award Is Unenforceable Because of Disregard by Arbitrator of Contractual or Legal Limitations on His Authority—Claim (12)*

Here it is assumed that the arbitrator had jurisdiction of the subject matter of the grievance; but it is alleged that his award either disregards some contractual limitation on his authority or disregards or misapplies some relevant rule of law.

1. *Contractual Limitations*

Illustrative would be the following case: the grievance protests the discharge of an employee; the labor agreement contains a "just cause" limitation on the right to discharge and provides that the arbitrator, upon finding an employee guilty of the offense charged, has no authority to modify the penalty; but the arbitrator, although finding the employee guilty of the offense, reinstates him without back pay. It is apparent that this kind of attack on the validity of an award does not involve an issue of arbitrability.

In considering this kind of case and others like it, we presuppose the inapplicability of the United States Arbitration Act,[119] although the Court has not yet ruled specifically on this question.[120]

118. See Summers, *supra* note 113. See also Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963).

119. 9 U.S.C. §§ 1-14 (1958).

120. Prior to the decision in *Lincoln Mills*, the lower federal courts were split as to the availability of the United States Arbitration Act to aid enforcement of labor arbitration agreements. *Compare* Local 19, Warehouse Workers v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956) (act held applicable to collective bargaining agreements), *with* United Elec. Workers v. Miller Metal Prods., 215 F.2d 221 (4th Cir. 1954) (act held inapplicable to collective bargaining contracts). In the *Lincoln Mills* case the Supreme Court did not discuss the applicability of the act, although

Moreover, we think it clear that, at least as to substantive matters, pre-emption principles make state arbitration statutes inapplicable to labor agreements enforceable under section 301 of LMRA, 1947, except to the extent that they are deemed to be rules absorbed by, or not inconsistent with, federal law.[121] If, however, the federal arbitration act or a typical state act were applicable, this kind of arbitral decision clearly would be subject to judicial review and the award would be denied enforcement.[122] Thus, more precisely expressed, the question is whether the Supreme Court will or should authorize judicial review in cases of this kind as a development of federal substantive law relating to the arbitration process.

We believe the Court should hold that judicial review is available in such cases, but only where, as in the illustration cited, the claim that the arbitrator has exceeded his authority is predicated upon a clear and specific provision of the agreement.[123] If the agree-

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the Fifth Circuit had held that an arbitration agreement could not be enforced under it. Lincoln Mills v. Textile Workers, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957). It would thus seem that the Supreme Court tacitly rejected its use with respect to collective bargaining agreements. See generally Burstein, *The United States Arbitration Act—A Reevaluation*, 3 VILL. L. REV. 125 (1958).

121. In Local 174, Teamsters v. Lucas Floor Co., 369 U.S. 95 (1962), the Supreme Court said that "incompatible doctrines of local law must give way to principles of federal labor law." See also Interstate Bakeries Corp. v. Bakery Drivers Union, 201 N.E.2d 452 (Ill. 1964), in which the court held that a state constitutional provision forbidding arbitration of future disputes was inapplicable in an action under § 301.

122. Section 10(d) of the United States Arbitration Act provides that an arbitration award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d) (1958). The New York statute provides that an award may be vacated where "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. . . ." N.Y. CIV. PRAC. LAW § 7511(b).

123. See Truck Drivers Union v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964). There the arbitrator found the employee guilty of the conduct for which he was discharged, but reinstated the employee without back-pay upon the ground that the penalty was too severe. The Court denied enforcement of the award for the reason that the arbitrator had exceeded his authority. The decision was based on the following provision in the parties' collective bargaining agreement:

> "If any grievance, arising out of any action taken by the Company in discharging, suspending, disciplining, transferring, promoting, or laying off any employee, is carried to arbitration, the arbitration board shall not substitute its judgment for that of management and shall only reverse the action or decision of the management if it finds that the Company's complaint against the employee is not supported by the facts, and that the management has acted arbitrarily and in bad faith or in violation of the express terms of the Agreement."

Some cases involving challenges to the authority of an arbitrator under the agreement to modify a disciplinary penalty are less easily decided. For example, if the agreement contains a just cause provision, and provides that "upon finding lack of just cause for a discharge, the discharged employee shall be reinstated with full back-pay," it is at least arguable that the prescribed remedy is required only upon a finding that no cause for discipline of any kind has been established. Thus, without being capricious, an arbitrator could conclude that his remedial authority is not contractually

ment is unclear (a matter presumably to be decided by the Court) and the basis of the arbitrator's award with respect to the matter contested is stated to be (or, if silent as to the rationale, could have rested on) an interpretation of the agreement, the teaching of the 1960 Trilogy cases, especially *Enterprise,* is that there should be no "second guessing" by a court.[124]

2. *Legal Limitations*

Under this caption are encompassed a variety of attacks upon the validity of an arbitral award. Illustratively, they include the claims: (1) that the arbitrator decided an issue not submitted; (2) that the award requires a violation of a federal or state statute; (3) that the award, although not requiring an illegal act, is inconsistent with public policy; (4) that the arbitrator, in analyzing the issue presented under the labor agreement, disregarded or misapplied some principle of federal substantive law relating to the labor agreement; (5) that fundamental principles of due process were violated in the conduct of the hearing. On most of these questions the federal substantive law has not yet been declared by the Supreme Court.

With respect to the first of these illustrative situations, the principle is well-established in the common law and state statutory arbitration law that an award is invalid to the extent that it purports to cover an issue not submitted by the parties.[125] We believe this principle should and will be engrafted into the federal substantive law. Indeed, the Court's opinion in *Enterprise* lends some

circumscribed where he finds the employee guilty of some dereliction insufficient to warrant discharge.

124. See Minute Maid Co. v. Citrus Workers, 331 F.2d 280 (5th Cir. 1964) (back-pay award held proper, although contract was silent on the matter); Electric Specialty Co. v. Local 1069, Int'l Bhd. Elec. Workers, 222 F. Supp. 314 (D. Conn. 1963) (reinstatement with back-pay held proper, even though contract and written submission were silent). *Cf.* Kansas City Luggage Workers v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964) (back-pay award vacated because issue of back-pay was not specifically submitted to the arbitrator).

125. See the New York statutory provision quoted at note 122 *supra.* See also UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES 208-09 (2d ed. 1961). The following excerpt from a New York court decision illustrates this point:

> "As provided in the purported notice, the arbitrator was limited to the claimed unlawful discharge of two members of the union whose reimbursement with back-pay was sought. The arbitrator, nevertheless, proceeded to hear and determine matters not set forth in the purported notice. These matters included a claim of a third employee, contributions or payments to the union welfare fund, and tips and gratuities received by employees which, by the terms of the contract, were not wages for the purposes of the agreement. . . .
>
> "As the arbitrator went beyond the limits of the matters stated in the alleged notice to be submitted to him and the scope of the claimed controversy, the award cannot stand. . . ." *In re* Culinary Employees, 4 Lab. Arb. 830 (N.Y. Sup. Ct. 1946).

support for this view.[126] A distinction should be drawn, however, between the case where the arbitrator decides a matter not comprehended at all by the grievance and the case where the arbitrator decides the matter submitted but in so doing rejects the parties' contractual theory and selects another that was not argued. The latter, we believe, should not be held to make the award defective, although the wisdom of such a decisional process is open to serious question.

The contention that an award is unenforceable because it requires a violation of a federal or state statute seems to us clearly to be a kind of claim which, as a matter of federal law, should be allowed. Included, for example, would be cases where it is alleged that the award: (a) requires the employer or the union to discriminate against employees in a manner forbidden by the National Labor Relations Act;[127] (b) requires an employer to deduct union dues or assessments from employees' wages in violation of section 302 of the LMRA;[128] or (c) requires a violation of federal or state antitrust laws. Surely it must be held that a party to an arbitration proceeding is entitled to a judicial determination of questions such as these.

The claim that an award is unenforceable because it is inconsistent with some recognized public policy, although not requiring performance of an illegal act, presents much greater difficulties. Examples are claims: (a) that the decision, purporting to be an application of some contract provision, has involved a determination that would not have been made had the issue been presented to the NLRB; or (b) that the decision is incompatible with public policy in some other respect, as, for example, a decision that requires reinstatement of an employee who has committed a heinous offense.

126. "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

127. See, *e.g.*, Glendale Mfg. Co. v. Local 520, Int'l Ladies' Garment Workers, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961), where the court held that an arbitrator's award directing an employer to bargain with a decertified union was unenforceable since it would require the employer to violate § 8(a)(1) of the NLRA. See Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N.Y.U.L. Rev. 448, 456-58 (1962).

128. See, *e.g.*, Carpenters v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D.P.R. 1964), where the court denied enforcement of an arbitration award insofar as it would require an employer to checkoff dues that had been timely revoked in accordance with § 302(c)(4) of the LMRA.

Carey has some bearing where the issue before the arbitrator might also have been presented to the NLRB. The Court there held that concurrent jurisdiction of the NLRB and the arbitrator did not deprive the arbitrator of authority to proceed. At the same time, it was recognized that there might be potential conflicts with ultimate Board rulings; in that event the Board's determination would be controlling and would justify a refusal to comply with the inconsistent arbitral award.[129] This, however, is not to say that independently of a Board proceeding involving the issue opportunity for judicial review of the award would or should be provided. Indeed, we would argue that, in general, this is an area where the orthodox limitations on judicial review should be invoked. And we think the same principle should be applied in the "public policy discharge" cases, at least in the absence of an enforceable statute giving the employer the absolute right to discharge for the kind of offense involved.[130]

A contention that the arbitral decision is defective because the arbitrator disregarded or misapplied some principle of federal substantive law relating to the labor agreement also presents difficulties. Examples are challenged arbitral determinations: (a) that an individual employee either did or did not have a right independently of the union to process a grievance to arbitration where such right is not expressly provided by the agreement,[131] (b) that a broad no-

129. "Should the Board disagree with the arbiter, . . . the Board's ruling would, of course, take precedence . . . ." Carey v. Westinghouse Elec. Co., 375 U.S. 261, 272 (1964).

130. In a recent Second Circuit case, the court confirmed an arbitrator's award reinstating an employee who had been convicted of gambling on the employer's premises, even though it noted that "'the power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States. . . .'" Local 453, Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963); *accord*, Jenkins Bros. v. Local 5623, United Steelworkers, 230 F. Supp. 871 (D. Conn. 1964). *Contra*, Avco Corp. v. Preteska, 22 Conn. Supp. 475, 174 A.2d 684 (Super. Ct. 1961). See also WPIX, Inc. v. Radio & Television Broadcast Eng'rs, 52 L.R.R.M. 2321 (N.Y. Sup. Ct. 1962), where the court upheld an arbitrator's decision that an employer did not have just cause for discharging an employee who, in his application for employment fourteen years earlier, had misrepresented that he was not a member of the Communist Party. On the other hand, in Black v. Cutter Labs., 43 Cal. 2d 788, 278 P.2d 905 (1955), *cert. dismissed with opinion*, 351 U.S. 292 (1956), the California Supreme Court vacated on public policy grounds an arbitrator's award that would have forced an employer to retain an employee who was an active member of the Communist Party. With respect to the latter case, see Kovarsky, *Labor Arbitration and Federal Pre-emption—The Overruling of Black v. Cutter Laboratories*, 47 MINN. L. REV. 531 (1963). See generally Meiners, *Arbitration Awards and Public Policy*, 17 ARB. J. (n.s.) 145 (1962); *Symposium—Arbitration and the Courts*, 58 NW. U.L. REV. 466, 545 (1963).

131. The prevailing judicial view seems to be that an individual employee has no standing to compel arbitration in the absence of a specific provision in the collective bargaining agreement giving him such a right. See, *e.g.*, Black-Clawson Co. v.

strike provision binds the union even though the strike is in protest against an employer unfair labor practice (despite the Supreme Court's decision in *Mastro Plastics*),[132] (c) that the union's violation of a no-strike provision either did or did not have the effect of suspending the employer's obligations under the contract or of giving the employer a right to terminate the agreement, and (d) that cited judicial interpretations of the effect of the recognition, union shop, or other provisions of the agreement on the existence or nonexistence of a limitation on the employer's right to subcontract may be disregarded.

In this area the ultimate answers, for the most part, seem to us to be unclear. The basic question is whether the Court, in discharging its role of superintendence of the development of emerging federal law concerning the collective bargaining agreement, will determine for reasons of policy that arbitral as well as judicial decisions should be in conformity with principles approved by the Court. An affirmative view would place issues of this kind in a special category to be differentiated from other kinds of alleged errors of contract interpretation, fact, or law with respect to which the orthodox rule of non-reviewability would obtain. In view of the relatively high degree of involvement of arbitrators, rather than courts, in the interpretation and application of collective bargaining agreements and the importance the Court evidently attaches to the development of an appropriate conceptualization of the collective agreement, we think it would regard some of these issues as fundamental and subject to judicial review, but, at the same time, it would be inclined to attach considerable weight to the views expressed by arbitrators.[133]

Drake Bakeries and *Needham* indicated, as we have argued, that any question such as (c) in the examples above cited is one for judicial determination. There is some difficulty, however, in any attempt to extend this approach to such issues as the scope of a no-strike clause or the problem of implied limitations on subcontract-

International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962) Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960). *Cf.* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963). See generally Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

132. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). See Jay, *supra* note 127, at 458-62.

133. One commentator, however, has noted that there is little indication that the substantive determinations of arbitraors have had much effect upon the courts. See Fleming, *Some Observations on Contract Grievances Before Courts and Arbitrators*, 15 STAN. L. REV. 595, 615 (1963).

ing. These questions basically can be analyzed as involving contractual intent rather than any basic precepts concerning the nature of the collective bargaining agreement. Cases such as *Webster Electric*[134] would have to be taken into account, however, and, if the Supreme Court were to adopt the Seventh Circuit's holding that a labor agreement containing a union shop clause implies a prohibition on the contracting out of bargaining unit work, the answer to the question whether this would become a rule of construction binding upon all arbitrators would depend upon how the Court rationalized its conclusion. If the analysis were simply in terms of determining contractual intent, the result should not be regarded as binding[135] or as subjecting a contrary arbitral ruling to judicial review. If, on the other hand, the Court were to say that as a matter of federal law the existence of a union shop or some other provision of the collective bargaining agreement carries with it a prohibition on subcontracting or is to be conclusively presumed to signify a certain intent whether factually founded or not, a different result might well follow.

Finally, an allegation that an award is unenforceable because of want of due process in the hearing and determination of the case obviously is a legal question that the courts will determine independently. This is orthodox arbitration law, and we are confident it will become part of the federal substantive law.

V. Concluding Observations

We have sought in this article to indicate the extent to which the Supreme Court during the past few years has fashioned federal law concerning the labor dispute arbitration process. We have also expressed opinions concerning the implications of the Court's decisions with respect to some matters not yet decided, and we have offered some views concerning certain legal issues on which the Court's decisions to date afford no concrete guidance at all.

The problems thus far presented to the Court in this area of

134. UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962).

135. Several arbitrators have held that the decision in the *Webster Electric* case was not binding upon them. See, *e.g.*, Ford Motor Co., 42 Lab. Arb. 220 (Platt 1964); Allis-Chalmers Mfg. Co., 39 Lab. Arb. 1213 (Smith 1964). As to the binding effect of court decisions, one prominent arbitrator has observed: "Arbitrators are not bound by judicial precedent. What may be the federal substantive law is not controlling in an arbitration proceeding wherein the Arbitrator is required to construe the language of the Contract by application of recognized maxims of contract interpretation and the general understanding of the Parties in the negotiation and administration of Collective Bargaining Agreements." United Packers, Inc., 38 Lab. Arb. 619 (Kelliher 1962).

labor law represent only a segment of the total range of questions which the judiciary will have to resolve in the execution of the task of developing a federal corpus juris of the collective bargaining agreement. Gradually these questions will find their way to the docket of the Court. Many will present fundamental issues. As recently as January of this year the Court in *Republic Steel Corporation v. Maddox*[136] refused to permit an employee covered by a labor agreement to sue on the contract when he had made no effort to use the stipulated grievance procedure. Mr. Justice Black, dissenting, saw the case as "an ordinary, common, run-of-the-mill lawsuit for breach of contract . . ." and took serious exception to any policy which would force the use of arbitration to resolve disputes involving "individual," as distinguished from group, interests and rights under a labor agreement. That he was the sole dissenter does not minimize the nature of the underlying problem. The majority opinion recognized that there may be qualifications on the union's right of exclusive control of the matter of enforcement of the labor agreement.

In solving these and other legal problems the courts have an awesome responsibility, since they are free—indeed in good conscience required—eclectically to make use of all available sources of guidance, even including the views of arbitrators! Their task is to construct an industrial code which will serve adequately the vital interests involved, including that of the public in preserving and strengthening the collective bargaining process. Mr. Justice Frankfurter, dissenting in *Lincoln Mills*, doubted that the judiciary could meet the challenge.[137] But the die is now cast. Federal law is being developed at an accelerating rate. How far the Court will or should go in structuring the law (whether, for example, to deal with matters of procedure as well as substance in relation to the arbitration process) is a problem meriting the serious concern and attention of all "friends of the court." It may be concluded, ultimately, that some legislative assistance is necessary. However, despite Mr. Justice Frankfurter's misgivings, we think the judiciary will probably be equal in the main to the challenge presented, and that on the whole the area is one which can best be treated, in the tradition of the common law, on a case-by-case basis, enabling a careful examination of real problems, the drawing of important distinctions, the testing of principle against practice, and practice against principle.

136. 85 Sup. Ct. 614 (1965).
137. 353 U.S. 448, 465 (1957).